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CASES

RELATING TO

RAILWAYS AND CANALS,

ARGUED AND ADJUDGED IN THE

Courts of Law and Equity.

1842 TO 1846.

BY



JOHN MONSON CARROW AND LIONEL OLIVER, ESQRS.,

BARRISTERS AT LAW.

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DIGEST OF THE CASES

RELATING TO

RAILWAYS AND CANALS

DECIDED IN

The Courts of Law and Equity

PREVIOUSLY TO

THE COMMENCEMENT OF THESE REPORTS.

ACCOUNTS.

1. By the 10 & 11 W. 3, c. 8, the proprietors of navigation shares in the river Tone are created a corporation with certain funds, directed to keep an account of their receipts and disbursements, which shall every year be examined, stated, corrected, and allowed by the Bishop of Bath and Wells, and the justices of the peace for the county of Somerset, or any five or more, at their first general quarter sessions, after a certain day, at which time they are to direct a distribution of the surplus profits, if any:—*Held*, that the sessions in one year have no authority to revise or correct any errors in the accounts, upon which a balance was struck and allowed at the sessions in any preceding year. *Rex v. Conservators of the River Tone*, 8 T. R. 286.

2. By the act for making and maintaining the Glamorganshire canal, power is given to the Canal Company to make all such works as they shall think necessary and proper for “effecting, completing, maintaining, improving, and using the canal and other works;” and the Company were

required to lay before the sessions an account of the sums expended in making and completing the canal, up to the time of its completion, and after that, an annual account of the rates collected, and of the charges and expenses of supporting, maintaining, and using the navigation and its works; and the sessions are authorized, in case it appears to them that the clear profits exceed the per centage limited by the act on the sums mentioned in the first account to have been expended by the Company (i. e. in making and completing the canal and its works), to reduce the canal rates:—*Held*, that the sessions, even after the period fixed for the completion of the canal, and after the first account delivered of the capital expended in the undertaking, and on which the dividends were to be calculated, were not authorized to reject charges and expenses, stated in the annual account of disbursements, for new works, such as a reservoir and steam engine, which the Company deemed necessary, and proved by evidence to have been erected for the support and improvement of the original line of canal, and for the better

supplying it with water in the dry seasons. Though it seems that, if the new works had been shewn to be merely colourable, and erected for purposes collateral to the navigation authorized by the act of Parliament, such charges would have been rightly rejected by the sessions. *Rex v. The Glamorganshire Canal Company*, 12 East, 157.

3. By a canal act, the Company of proprietors were authorized to make the canal, and to do all other acts which they might think necessary and convenient, for the making, improving, and using the canal, and the profit of the Company on the money expended in making and completing the navigation was not to exceed 8 per cent. per annum; and, in order to ascertain the clear amount of the profits of the navigation, the Company were required to keep an account of the money laid out in making the canal, and of all charges incurred before the canal was completed; and also to make out an annual account, balanced to the 29th of September, of the rates, and of the charges attending the supporting, maintaining, and using the said navigation, and these accounts were to be laid before the justices at quarter sessions, and they were to reduce the rates whenever the clear profits of the navigation exceeded 8 per cent. upon the money laid out:—*Held*, that the Company were authorized to widen and deepen the canal after it had been once completed (that being beneficial to the public), and that the charge of such widening and deepening was a charge attending the using of the canal. *Rex v. Justices of Glamorganshire*, 7 B. & C. 722.

4. By an act of the 44 Geo. 3, for making the river Tone navigable, conservators were appointed, and all powers given by two former acts of Parliament to the Bishop of Bath and Wells, and the justices of the peace for the county of Somerset, to exa-

mine, state, correct, and allow the accounts of the conservators of the river Tone, were repealed, and instead of such powers, it was enacted, "That the accounts of the conservators should be made up to the 24th of June yearly, and the accounts so made up, and vouchers for the same, should be brought before the Bishop of Bath and Wells, or any five of the said justices without the said bishop, between the first day of August and the then next general quarter sessions of the peace to be held for the county of Somerset, at a place appointed by the bishop, or any five of the justices without the bishop, then and there to be examined, stated, and corrected; and the accounts, whether or not the same should have been examined and corrected by the said bishop and justices, were to be brought before the bishop and justices, or any five of the justices in the absence of the bishop, at the opening of the court of the next quarter sessions to be held after the first day of August yearly; and the bishop and justices at the said sessions, or any five of the justices in the absence of the bishop, were required to examine, state, and allow the said accounts of the conservators, and that allowance was to be final and conclusive:"—*Held*, that the bishop and justices were bound to examine, state, and allow the accounts at the first sessions, and had no authority to adjourn the examination to a subsequent sessions:—*Seemle*, that the conservators of the river Tone were a corporation, not merely for the purpose of holding lands, but for the purpose of receiving the tolls. *The Bridgewater and Taunton Canal Company v. Bluett*, 10 B. & C. 393.

ACQUIESCENCE.

See INJUNCTION, 8.

1. To have a work, erected at great expense, whether private or public

removed by this Court as a nuisance, the person complaining should have given notice not to proceed, otherwise the Court will leave the complainant to law. *Jones v. Royal Canal Company*, 2 Moll. 319.

2. The commissioners of a canal make an agreement for letting the tolls not warranted by the act under which they derive their authority, and prejudicial to an interest expressly reserved by the act to the public. This agreement is acquiesced in for forty-seven years without complaint on the part of any of the shareholders, and during that period the lessee remains in undisturbed possession of the tolls. The Court will not, at the suit of the shareholders, disturb his possession by the appointment of a receiver. *Gray v. Chaplin*, 2 Russ. 126.

3. Circumstances under which a claim for repetition (i. e. repayment) of money alleged to have been paid in ignorance held to be barred. *Dixon v. Monkland Canal Company*, 5 Wil. & Shaw, 445.

ACT OF PARLIAMENT.

See CONSTRUCTION OF STATUTES.

ACTION.

See EXECUTORS, 3.

LIMITATION.

MANDAMUS, 14.

MINES, 3.

NAVIGATION, 10.

PROPRIETORS.

1. The acting commissioners for making a brook navigable, with power to borrow money, &c., employed the plaintiff to do different parts of the works, and such of the commissioners as were present at the several meetings made orders relative thereto. Every one of them was present at some of the meetings, but no one was present at all the meetings. The fund proving deficient:—*Held*, all the

acting commissioners were personally liable to pay plaintiff. *Horsley v. Bell*, 2 Amb. 770.

2. Where the agent employed in endeavouring to carry through Parliament a bill for making a railway, sued the chairman of a committee of subscribers to the undertaking for his work and labour, and expenses incurred as such agent, and it appeared that the agent himself was a subscriber to the undertaking:—*Held* that the action would not lie. *Holmes v. Higgins*, 1 B. & C. 74; 2 D. & R. 196.

3. A. B., at the request of the plaintiff, became the holder of shares, for the benefit of the plaintiff, in a Company to which the plaintiff was solicitor. The plaintiff paid the deposits, and all the expenses on the shares. In an action by him against the members of the Company, for money laid out for the use of the Company, in advertising and in journeys:—*Held*, that the plaintiff could not recover, as being the real (though A. B. was the ostensible) partner. *Goddard v. Hodges*, 1 C. & M. 33; 3 Tyr. 209.

4. A defendant is liable for an engineer's bill, although it was not proved that he had signed a deed as a director, or was present at the meeting at which the order was given, if it be shewn that he attended subsequent meetings, and inspected the work during its progress. *Maudsley v. Le Blanc*, 2 C. & P. 409, n.

5. Where a member of a joint-stock Company advanced money to a director of the Company, knowing that it was to be applied in taking up a bill of exchange which such director had become a party to, for the purposes of the Company, it is a question for the jury whether the member advanced the money on the credit of the Company at large, or on that of the director individually. *Colley v. Smith and others*, 2 Mood. & R. 96.

6. Where a particular jurisdiction is appointed under a canal act, to determine all questions that may arise respecting things to be done in pursuance and in execution of the act, if the projectors of the canal exceed their powers, or do any act not strictly within the terms of the statute, by which any individual finds himself aggrieved, he is not confined to the particular jurisdiction, but the wrong is to be remedied in the ordinary manner. *Shand v. Henderson*, 2 Dowl. 519; and see *Bex v. Croker*, Cowp. 26.

7. The commissioners of sewers cannot maintain an action of trespass against the commissioners of a harbour, for breaking down a wall or dam erected by the former, as such commissioners, across a navigable river, as the authority to be exercised by them, on behalf of the public, does not vest in them such a property or possessory interest as will enable them to maintain such action. *Newcastle (Duke of) v. Clark*, 2 Moore, 666.

8. A separate notice to each of several persons, intended to be sued in trespass, is sufficient to found a joint action against all of them, for acts committed in pursuance of an act of Parliament, which provides that no plaintiff shall recover in an action for any thing done in pursuance thereof, without notice to the defendant or defendants of such intended action, although none of the other persons who are afterwards joined in the action are named in the notice to either of them. *Agar v. Morgan*, 2 Price, 126.

9. The contractors for making a navigable canal having, with the permission of the owner of the soil, erected a dam of earth and wood upon his close, across a stream there, for the purpose of completing their work, have a possession sufficient to entitle them to maintain trespass against a

wrong-doer. *Dyson v. Collick*, 5 B. & A. 600; 1 D. & R. 225.

10. In trespass for building and heightening the plaintiff's wall, and thereby obstructing his lights, the defendant pleaded the general issue. At the trial, the defendant having proved that the wall was a party-wall, and that he had acted under a *bond fide* impression, that the provisions of the Building Act, 14 Geo. 3, c. 78, s. 43, justified him in raising the wall, the plaintiff was nonsuited, he not having given a notice of action, as required by sect. 100 of that act:—*Held*, that the evidence was properly received under the general issue, and that the nonsuit was right. *Wells v. Ody*, 2 C., M. & R. 128; 7 C. & P. 22.

11. By a navigation act, the shares were declared to be vested in the subscribers, their executors and assigns, with power to the subscribers to assign their shares; and a committee to be appointed under the act were authorized to make calls on the proprietors of shares at such time as they should think fit:—*Held*, that an original subscriber is not liable for any call made by the committee, after assigning his share. The same act empowered the Company to sue for calls, &c., “by action of debt, or on the case:”—*Held*, that an action on the case in tort lay. *The Huddersfield Canal Company v. Buckley*, 7 T. R. 36.

12. Where a private act gives the trustees of a river navigation power to sue for arrears of tolls “by action of debt, or on the case,” assumpsit will lie. *Corbett v. Carpmael*, 2 N. & M. 834.

13. By the Building Act, 14 Geo. 3, c. 78, s. 100, it is enacted, that if the plaintiff be nonsuited, the defendant shall have judgment to recover treble costs. *Semble*, that in such a case it is not necessary for the defendant to enter a suggestion on the roll to en-

title himself to treble costs. *Wells v. Ody*, 2 C., M. & R. 184.

14. The Building Act, 14 Geo. 3, c. 78, s. 43, which authorizes the building or raising of a party-wall, does not protect a party from liability for any collateral damage resulting from the building so erected, and an action on the case is maintainable by the occupier of an adjoining house, for heightening and building on a party-fence wall, whereby his windows were darkened. *Id.*, 1 M. & W. 452.

15. An individual who had suffered a loss in consequence of a decay of sea walls, which a corporation is directed to repair under the terms of a grant from the Crown, conveying a borough and pier or quay tolls to the corporation, may sue the corporation for damages. *Lyme (Mayor, &c.) v. Henley*, 3 B. & A. 77; 5 Bing. 91.

16. So, as the obligation concerns the public, an indictment would lie for the general default. So, when the obligation arises from prescription. *Lynn (Mayor of) v. Turner*, Cowp. 86; S. P. *Anon.* Lofft, 556.

17. It seems that an incorporated Company may be guilty of a conversion by the act of their agent, acting under the direction of a committee appointed for managing the affairs of such Company, and, therefore, that trover is maintainable by the owner of goods detained by the Company's agent, after a notice had been given by the plaintiff, requiring the directors of such Company to deliver the goods to him. *Duncan v. Surrey Canal (Proprietors)*, 3 Stark. 50.

18. Where an action on the case would lie at the suit of an individual for a diversion of a watercourse, an indictment will lie where the act affects the public. *Rex v. Trafford*, 1 B. & Ad. 874.

19. When a defendant had suffered judgment by default, in an action for calls on shares in a Railway Company, on which interest is also claimed pur-

suant to the provisions of the act of Parliament, the Court will not grant a rule to compute, but will direct a writ of inquiry to be executed. *Cheltenham and Great Western Union Railway Company v. Fry*, 7 Dowl. 616.

ADMINISTRATOR.

See EXECUTOR.

AFFIDAVIT.

See CONSTRUCTION OF STATUTES, 8.

(Equity).

1. Answering an affidavit is a waiver of any objection which might be taken to it on the ground of notice not having been given that it was to be used. *Blackmore v. Glamorganshire Canal Company*, 5 Russ. 151.

(Law).

2. An affidavit for a certiorari, to remove an inquisition taken to assess compensation under a railway act, should set out an exact copy of the inquisition, or account for the omission.

Such an affidavit should also distinctly set out particular facts sufficient to raise a question of law and a presumption of error in the inquisition. An affidavit, therefore, which, after reciting that the inquisition stated certain lands were authorized to be taken under the act, added generally, "which deponent asserts is not the fact," is sufficient.

The following words in an affidavit, "and deponent further objects," that there was notice, &c., are bad, as not amounting to a categorical allegation. *Reg. v. The Manchester and Leeds Railway Company*, 3 N. & P. 439; 8 A. & E. 413.

3. Where an act of Parliament, for making a railway, directed that inqui-

sitions for assessing compensation to the owners of lands required by the Company, should be taken before the sheriff of the county, and that such inquisitions and judgments thereupon should be kept by the clerk of the peace among the records of the county, and be deemed records to all intents, &c.:—*Held*, first, that certiorari lies, even after judgment, to remove such an inquisition: second, that the rule to shew cause why the certiorari should not issue, was properly directed to the clerk of the Company, although the inquisition was out of their custody.

Where a party has once failed, on account of the insufficiency of his affidavits, to obtain a rule for a certiorari, the Court, in the exercise of its discretionary power over proceedings by certiorari, will not allow him to renew his application on amended affidavits. *Reg. v. The Manchester and Leeds Railway Company*, 1 P. & D. 164; 8 A. & E. 413.

AGENT.

See ACTION, 2, 17.
AGREEMENT, 6.

AGREEMENT.

See EVIDENCE, 2, 4.
MINES, 4.

1. Certain persons intended to form a railway from A. to B., which was to pass over the plaintiff's estate. The plaintiff opposed the project, but on the agent for the projectors agreeing in writing to pay him 2000*l.* for the portion of his estate over which the railway was to pass, he consented to withdraw his opposition. At the same time certain other persons intending to form a railway between the same termini, but by a different line, which also passed through the plaintiff's estate, but not

through the same part of it as the former line: fourteen acres of the plaintiff's land were required for the former railway, and sixteen acres for the latter. The plaintiff opposed the latter railway also. The agents for the rival projectors then entered into and signed an agreement (which was approved of and signed by the plaintiff's agent), by which they agreed that the first line should be abandoned, and the second adopted, and that the adopted line should take the engagements entered into with the land-owners by the abandoned line, and thereupon the plaintiff withdrew his opposition to the adopted line, and the act of Parliament for making the second railway, and for incorporating the projectors of it was passed:—*Held*, that the incorporated Company were bound to perform the agreement made with the plaintiff by the projectors of the first railway. *Stanley v. Chester and Birkenhead Railway Company*, 9 Sim. 264; 3 My. & Cr. 773.

2. Where a person, acting on behalf of the subscribers to a railway, who were then soliciting a bill in Parliament, for the purpose of forming themselves into an incorporated joint-stock Company, entered into a contract with the trustees of a road, whereby it was stipulated, that, in consideration of the trustees withdrawing their opposition in Parliament, and consenting to forego certain clauses, the insertion of which they had intended to press in the act, a formal instrument to the effect of the clauses should be executed under the seal of the Company when incorporated, and the bill was accordingly allowed to pass unopposed, and without the clauses, an injunction was granted at the suit of the trustees to prevent the Company from violating the provisions contained in the omitted clause. An agreement to withdraw or withhold opposition to a bill in Parlia-

ment is not illegal, and a court of equity will enforce a contract founded on such a consideration. *Edwards v. The Grand Junction Railway Company*, 7 Sim. 337; 1 My. & Cr. 650.

3. Two railways, called A. and B., were projected by different parties, to run from M. towards N. The line of A. passed through the centre of the plaintiff's estate, and the line of B. through a corner of it. The projectors of A. agreed with the plaintiff for the purchase of that portion of his land which they required, and they were to have power to vacate the agreement in case the act for making their railway should not pass. Two bills were brought into Parliament for forming the railways, and were referred to a committee, at whose suggestion the two projects were amalgamated, and an act was passed, incorporating the projectors of both railways, partly in the line of A., and partly in the line of B., the latter being the line selected with respect to the plaintiff's estate. Pending the act, the promoters of the two railways agreed with each other, that where either Company should have entered into contracts with the land-owners whose property might be affected by either line, though in a somewhat different mode, the contracts entered into by the Company proposing the rejected line should be adopted by the united Company. A copy of this agreement was subsequently sent to the plaintiff by the united Company. The projectors of the line A. afterwards vacated their agreement with plaintiff:—*Held*, that the plaintiff could not enforce that agreement against the united Company. *Greenhalgh v. The Manchester and Birmingham Railway Company*, 9 Sim. 416; 3 My. & Cr. 784.

4. Securities given to persons who would be prejudiced by the passing of a private bill in Parliament, in con-

sideration of their withdrawing their opposition to it, are not illegal. *Vauxhall Bridge Company v. Earl Spencer*, Jac. 64.

5. Agreement for sale of real property, with a stipulation that, if the residue of the purchase-money is not paid by a certain day, the agreement shall be void, and the vendors shall have power to resell. The money is not paid on the day, but the purchaser retains possession, giving a warrant of attorney to confess judgment in ejectment. The stipulation as to time in the agreement is waived. *Ex parte Gardner, in re Eastern Counties Railway Act*, 4 Y. & C. 503.

6. In a suit for specific performance of a written agreement, a parol variation not set up by the answer, but coming out on the cross-examination of the defendant's agent, who was one of the plaintiff's witnesses, is a subject for inquiry before the Court finally disposes of the case, *semble*.—But the plaintiff consenting to adopt it as a part of the contract, a specific performance of the contract, with the parol variation, was decreed immediately, with costs. An objection to a bill by an incorporated railway Company for specific performance of a contract for the purchase of land entered into by their agent, that it did not appear that the agent was authorized under the corporate seal, and therefore that there was no mutuality, overruled, on the ground that the Company had, before the bill was filed, not only acted on the contract by entering into possession of the land, but actually made a railroad over it. *London and Birmingham Railway Company v. Winter*, 1 Cr. & Ph. 57.

ANNUITY.

See COMPENSATION, 2.

Whether an annuity or rent-charge out of the profits of the New River

Company is to bear the full assessment of the land-tax, or is to have the benefit according to the proportion of a reduction in consequence of an assessment upon the profits of the Company at an under value, *quære?* The bill by the annuitant was dismissed, the Court refusing to raise an equity as to the profit arising from disobedience to the act. *Adair v. New River Company*, 11 Ves. 429.

ANSWER.

See PRACTICE, 1, 5.

APPEARANCE.

See PRACTICE, 3.

ARBITRATION.

See BANKRUPT, 6.

MANDAMUS, 4, 6.

TOLLS, 2.

1. Where parties by mutual bonds submitted all matters in difference to arbitration, and the award, after reciting the submission, awarded (without stating it to be of and concerning the premises) that a certain sum was due and owing from one party to the other:—*Held*, that the award must be intended to be made on all the matters referred.

It also appeared by affidavit that the claims of one of the parties consisted of items for money due, and also for prospective damages, in consequence of a contract between the parties being put an end to by the other side; but it also appeared that each of the claims was investigated before the arbitrators:—*Held*, that a general finding was sufficient, that a balance was due to one of the parties.

Where on a reference one of the parties admits the claim of the other, but seeks to reduce the balance by a set-off, it is sufficient for the award to state that a sum is owing to one side or the other, without further noticing

the set-off. *In re Croydon Canal Company*, 1 P. & D. 391.

2. Where, by agreement of reference, the arbitrator is to take a view previous to entering on the reference, and he takes such view, the non-recital of the view is no objection to his award. *Spence v. Eastern Counties Railway Company*, 7 Dowl. 697.

ASSUMPSIT.

See ACTION.

BANKRUPT, 7.

ATTORNEY AND SOLICITOR.

See ACTION, 2.

TOLLS, 10.

BANK—EMBANKMENT.

See MANDAMUS, 9.

NAVIGATION, 1.

NUISANCE, 2, 3, 4.

PUBLIC, 5.

RATING, 6.

REPAIRS.

WATERCOURSE, 2, 4.

WORKS, 8.

BANKRUPT.

See LIMITATION, 5.

(Equity).

1. Where a Company is formed by act of Parliament, for the purchase of lands to make a canal, and the act declares that the shares "shall be deemed personal estate, and shall be transmissible as such:"—*Held*, that, though the profits arose out of the land, the shares were personal property, passing as such to the assignees on the bankruptcy of a proprietor. *In re Dilworth*, 1 Dea. & Ch. 411.

2. A., B. & C., being bankers in copartnership, were appointed treasurers of a corporate body, and executed a joint and several bond in a penalty of 20,000*l.*, conditioned for the

due performance by them of various duties as treasurers, and especially that they would "when thereunto required by the said Company, &c." pay all balances in their hands, &c. A commission of bankrupt issued against A., B. & C., who had at the time a large balance in their hands as treasurers, but no demand under the bond having been made by the Company before the bankruptcy:—*Held*, that there was not a sufficient breach of the condition to constitute a debt proveable against the separate estates of the bankrupts. *Ex parte The Lancaster Canal Company, re Dilworth*, Mont. 27.

3. Canal shares, if deemed personal property, are within the clause of reputed ownership. *Id.*, Mont. 116.

4. Holders of stock in public Companies not liable to the bankrupt law in that character only. *Ex parte Bell*, 15 Ves. 357.

(Law).

5. A writ of supersedeas, reciting that a commission issued on a day certain, is evidence to shew that such a commission issued on that day. *Gerris v. Grand Western Canal Company*, 5 M. & S. 76.

6. In trover by the assignees of S. against the London Dock Company, to recover certain engines, machinery, implements, and materials, the cause having been referred by order of Nisi Prius, the arbitrator found that a contract had been entered into between S. the bankrupt and the London Dock Company, to execute certain works required for the formation of an entrance to the docks, and to provide the materials for that purpose, in consideration of 52,200*l.*, and of being allowed to appropriate certain materials to his own use. The engineer of the Company was to be the sole judge of the works, and to have the power of rejecting any materials or work not in his opinion conformable

to the plans and specifications, and to provide other materials in lieu of those rejected, and to employ competent persons to perform the work, if S. failed to do so; in which case the cost or amount thereof was to be deducted from the sum to become due to him under that contract. The directors were to be at liberty to alter the plans, and thereby add to or diminish any part of the works, in which case a proportionate addition or deduction was to be made to or from the sum to be paid to S., according to the schedule of prices contained in the specification. S. commenced the works, and placed on the premises steam-engines, railroads, materials, and implements necessary for carrying on the works. The Company's engineer superintended the works, and examined the materials brought upon the premises by S., and rejected such as he thought were not proper for the purpose. The whole of the premises where the works were carried on, and upon which the machinery and materials were placed, belonged to the Company. During the progress made of the works, advances were by the Company to S., on application, beyond the sums he was entitled to receive, he referring them by letter to the engines, railroads, implements, and materials lying on the premises, and stating the particulars of which they consisted, as their security for such advances. S. became bankrupt before the works were completed, upon which the dock Company erased S.'s name from the implements, &c., and took possession of the engines, materials, implements, &c., then on their premises. The Company were always in advance to S. to an amount exceeding the value of the property on the premises:—*Held*, first, the arbitrator having awarded that the Dock Company were entitled to prove against the estate of S. for the sum advanced to him beyond what

he was entitled to for the work done, and materials furnished by him, and the value of the engines, &c., that the arbitrator had no authority to award on that matter, and that the award as to that ought to be set aside:—*Held*, secondly, that the plaintiffs were not entitled to recover for the extra work done by the bankrupt, that being still work done under the contract, and the work done under the contract having been overpaid:—*Held*, thirdly, that the defendants were entitled to insist on the lien given to them on the engines, materials, &c., as a security for their advances, and that there was a sufficient possession by the defendants to support the lien; and that the plaintiffs were not entitled to recover such engines, materials, &c., but that they were entitled to recover for such of the materials as were brought upon the defendants' premises after the bankruptcy:—*Held*, fourthly, that payments made to the bankrupt by the defendants, subsequent to the time when the latter materials were brought on the premises, could not be considered as payments for those particular goods in the course of business, but merely as general advances only, and that the defendants were not entitled to the protection of the 6 Geo. 4, c. 16, s. 82. *Crowfoot v. London Dock Company*, 2 C. & M. 637.

7. To assumpsit by assignees of a bankrupt I., for the non-acceptance of shares in the Great Western Railway, which the bankrupt, before his bankruptcy, had contracted to sell to the defendant, and to convey to him on a day subsequent to the bankruptcy, the declaration averring that the plaintiffs were the proprietors of the shares, and that they tendered certificates of them to the defendant; the defendant pleaded, first, that I. committed no act of bankruptcy; secondly, that the act of bankruptcy on which he was declared a bankrupt was unlawfully concerted between I.

and the plaintiffs, and that he committed no other act of bankruptcy; thirdly, that the plaintiffs were not proprietors of the shares; fourthly, that they did not tender certificates of them to the defendant. The act of bankruptcy consisted in I.'s having given directions when in embarrassed circumstances, that he should be denied to all persons; but there was no proof that any person was in fact denied, nor that I. secreted himself. The jury found that the denial was with intent to delay his creditors. *Quære*, whether this was an act of bankruptcy:—*Semble*, this was not a case in which the depositions were conclusive evidence of the matters contained in them, under the 6 Geo. 4, c. 16, s. 92, inasmuch as the bankrupt could not have fulfilled his contract on the day specified, and therefore this was not a debt or demand for which he could have sustained an action. But even if the case were within that section, *semble*, that evidence might be given to shew that the act of bankruptcy was concerted.

In order to prove their proprietorship of the shares, the plaintiffs put in the transfer book kept by the Great Western Railway Company under the railway act, 6 & 7 Will. 4, c. cvii, s. 158, in which the plaintiffs were entered as transferees:—*Held*, that this was not sufficient evidence of their title.

The certificates tendered by the plaintiffs to the defendant did not contain the names of the plaintiffs as original proprietors, nor had they any endorsement of transfer to them:—*Held*, that such certificates were insufficient, inasmuch as they did not shew a title in the plaintiffs to convey the shares under the act, sects. 147, 158. *Hare v. Waring*, 3 M. & W. 362.

BARGE-WAY.

See RATING, 7.

BILL IN PARLIAMENT.

See ACTION 2.

AGREEMENT, 1, 2, 3, 4.

CONSTRUCTION OF STATUTES,
13.

TOLLS, 10.

BOOKS OF COMPANY.

See EVIDENCE, 5.

MANDAMUS, 8, 11, 12, 13.

BRIDGE.

See RATING, 38.

WORKS, 2, 3, 4, 6, 7.

BUBBLE ACT.

See AGREEMENT, 4.

PUBLIC COMPANY.

BUILDING ACT.

See ACTION, 10, 13, 14.

COMPENSATION, 14, 15, 16.

COSTS, 12.

CALLS.

See ACTION, 11.

EXECUTORS, 1, 3.

PROPRIETORS.

CAPITAL.

See PROPRIETORS, 4.

CARRIER.

1. A common carrier between A. and B., employed to carry goods from A. to B. to be forwarded to C., carried them to B., there put them in his warehouse, in which they were destroyed by an accidental fire before he had an opportunity of forwarding them; and held not answerable for the loss. *Garside v. Trent Navigation*, 4 T. R. 581.

2. Common carriers from A. to B. charge and receive for cartage of goods to the consignee's house at

B. from a warehouse there, where they usually unloaded, but which did not belong to them: they must answer for the goods, if destroyed in the warehouse by an accidental fire, though they allow all the profits of the cartage to another person, and that circumstance were known to the consignee. *Hyde v. Trent and Mersey Navigation Co.*, 5 T. R. 389.

3. How far a carrier is liable for an unavoidable accident, not coming within the description of accidents happening from the act of God, or the king's enemies. *Trent Navigation v. Wood*, 3 Esp. 127; *Abb. Ship*. 256; 4 Doug. 287.

4. By the statute 3 Will. 4, c. xxxiv, the Grand Junction Railway Company are empowered to make a railway from Warrington to Birmingham: by sect. 154 they are empowered to receive certain tonnage rates for all articles, matters, or things carried or conveyed on the railway: by sect. 156, the Company are empowered to become carriers themselves, and are authorized, if they shall think proper, to use engines, &c., to carry and convey upon the railway all such passengers, cattle, goods, wares, and merchandize, articles, matters, and things, as shall be offered to them for that purpose, upon certain reasonable charges: by the 214th section, "no action, suit, or information, nor any other proceeding of what nature soever, shall be brought, commenced, or prosecuted against any person for any thing done, or omitted to be done, in pursuance of the act, or in the execution of the powers or authorities, or any of the orders made, given, or directed in, by, or under the act, unless fourteen days' previous notice in writing shall be given by the parties intending to commence or prosecute such action, &c.; nor unless such action, &c., shall be brought within three months." And by the 215th section, power to tender amends is given. Under the 156th section,

the Company became carriers themselves. In an action against the Company (alleging them to be owners and proprietors of the railway) for not safely carrying and conveying some horses in their carriages on the railway, whereby one was killed and others were injured:—*Held*, that the Company were not entitled to notice of action, as for a thing done or omitted to be done, in pursuance of the act; and that, not having restricted their liability by any special contract, they were subject to the liabilities of carriers at common law.

At the trial there was contradictory evidence as to whether a ticket, by which the Company sought to limit their liability, had been delivered to the son of the plaintiff; and the learned Judge left it to the jury to say whether it was delivered to him or not:—*Held*, that it was no misdirection in not directing them to find whether it was read over and explained to him. *Palmer v. Grand Junction Railway Company*, 4 M. & W. 749; 7 Dowl. 232.

5. Declaration in case against the Grand Junction Railway Company, for the loss of goods delivered to them as common carriers, to be safely and securely carried and conveyed.—Plea, that the delivery and receipt of the goods were and happened after the passing of the 4 Will. 4, c. lv, and that, at the time of such delivery, the plaintiff became and was a passenger by the railway; and that the goods were delivered to be conveyed with him as such passenger; and that no part thereof were articles of clothing of the plaintiff. To this plea there was the general replication *de injuriâ*:—*Held*, on special demurrer, that the replication was ill, inasmuch as the plea did not consist of matter of excuse, but amounted to the general issue. *Elwell v. The Grand Junction Railway Company*, 5 M. & W. 669; 8 Dowl. 225.

COMPENSATION.

CASE, ACTION ON.

See ACTION, 11, 12, 14.

PLEADING, 5, 6.

TOLLS, 13.

WATER, 3.

CERTIORARI.

See AFFIDAVIT, 2, 3.

COMPENSATION, 17, 25, 26, 27.

CHATTEL.

See DOCK, 10.

COMMISSIONERS.

See ACTION, 1, 7.

MANDAMUS, 9, 10.

The commissioners under a navigation act having decreed an indemnity according to a clause not applicable to the particular injury complained of, the order was reversed. *Rex v. Douglas River Undertakers*, 2 Ld. Ken. 499.

COMPANY.

See PUBLIC COMPANY.

COMPENSATION.

See DOCK, 1, 2.

INDEMNITY.

MASTER IN CHANCERY, 2.

MINES, 4.

WATER, 3.

(*Equity*).

1. By a drainage act, the commissioners were empowered, when required for the purpose of the act, to purchase and to make satisfaction for damage done to lands; and, if the landowners refuse to treat, then to apply to two magistrates to issue their warrant to the sheriff to summon a jury to ascertain the amount of the purchase-money or satisfaction. By a subsequent section, if the landowners and the commissioners could not agree as to the compensation

for damages done by the commissioners, the same were to be ascertained by a jury to be impanelled as afore-said:—*Held*, that, in that case, the owners of the lands damaged, and not the commissioners, were to apply to the magistrates. *Re Eau Brink Drainage*, 3 Sim. 435.

2. Under an act of Parliament for making docks, the value of compensation for property taken for the purpose of the act was directed, in certain cases, to be paid into the bank in the name of the Accountant-General, and to be laid out in bank annuities; and, until such bank annuities should be sold, and the produce invested in other hereditaments, the dividends were to be paid to the person or persons who would be entitled to the rents and profits of the hereditaments, if unsold. The act also directed that the Court, on the application of any person or persons making claim to the money awarded as a compensation by motion or petition, should, in a summary way of proceeding or otherwise, order the same to be laid out and invested in the funds, or distribution thereof, or payment of the dividends, according to the estate, title, or interest of the person making claim thereto. On the petition of an annuitant, whose annuity was charged on the property, with powers of distress and entry, and farther secured by a term for payment of his annuity and the arrears thereof out of a fund brought into Court under the act, the Court held that it had no authority to proceed in a summary way on the petition of an incumbrancer; but only at the instance of the persons who would have been entitled to the rents, if the property had been unsold, and dismissed the petition. *Ex parte Back*, 2 Y. & J. 386.

(*Law*).

3. Under a turnpike act the trustees had power to turn roads through

private grounds, making satisfaction to the owners; and, if they could not agree, they were enabled, on giving notice to the owners, to summon a jury to ascertain the damage, and to order such sum so ascertained to be paid to the owners. The Court quashed an inquisition of the jury, and an order of the trustees under this act, because it did not appear on the face of the proceedings that any notice had been given to the owners of the land. *Rex v. Bagshaw*, 7 T. R. 363.

4. The compensation clause, sect. 121 of the stat. 39 Geo. 3, c. 69, directing, that in case any warehouses, &c., (used for holding West India produce before that act) should be rendered less valuable, by reason of the West India trade being diverted therefrom by the then intended West India docks and works, than they were before the passing of this act; or, in case the yearly or other receipts of Christ's Hospital should be thereby lessened; the owners of such warehouses, &c., and the governors of the hospital, should be compensated, (thereby putting such owners and governors on the same footing),—must be construed with reference to the yearly profits made of the premises antecedent to the passing of the act, and the value of such warehouses cannot be evidenced by the yearly profits made between the passing of the act and the opening of the docks, by which the latter loss was occasioned. *Manning v. The West India Dock Commissioners*, 9 East, 165.

5. Under the Bristol Dock Act, 43 Geo. 3, c. 140, s. 107, which gives compensation where, by means of the dock works, or in the progress of execution thereof, damage may be done to any hereditaments, houses, lands, and tenements, or the same may be rendered less valuable thereby, no compensation is due to the owners of a brewery for a loss arising to them

in their business from the deterioration of the water of the public river Avon, from which the brewery had been before supplied by means of pipes laid under low-water mark, the use of the water having been common to all the king's subjects, and not claimed as an easement to the particular tenement: the only remedy for such an injury is by indictment, which was taken away in this case by the act of Parliament. *Rex v. Bristol Dock Company*, 12 East, 429.

6. A local drainage act provided, that the owners and proprietors of lands, (by and at whose expense certain banks should be made for the purposes of the drainage), their heirs and assigns, should be reimbursed such expenses or such share thereof as should be ascertained by certain commissioners appointed under the act; and a subsequent act, which imposed an additional tax upon those lands, provided that such tax should not be payable until the repayment of such of the above expenses as the owners and proprietors of the said lands for the time being should make appear, to the satisfaction of the commissioners, to have been necessarily expended in making banks. The act also contained clauses, whereby tenants for life or in tail were especially enabled to borrow money, and to charge the lands with it, for the purpose of defraying the expenses of making banks, under these acts. J. S., who had expended 800*l.* in making banks, afterwards sold his lands, without reserving to himself or taking any notice in the conveyance of the reimbursement above mentioned; and the commissioners having subsequently determined the amount of the reimbursement:—*Held*, that the purchaser, and not J. S., was entitled to receive it. *King v. The Witham Navigation Company*, 3 B. & A. 454.

7. By an act of the 16 & 17 Car. 2,

certain persons were authorized to make navigable the river Itchin, and certain other rivers, and to cut, dig, and make new channels, and to deepen or widen the rivers, channels, &c., and to do all that might be fit for navigation, and to build locks, &c. upon any of the lands adjoining the rivers, &c., and to make towing paths; and it was expressly provided that the undertakers of the navigation should not make any trench, river, or water-course, or use the locks, &c., upon the land of any person until a full agreement with, and satisfaction to the owners of the land had been made by the commissioners appointed by the act, or by the persons authorized to make the navigation, nor until satisfaction should be paid to the respective owners of the lands, according to the determination of the commissioners, or by agreement, by the undertakers of the navigation. By a subsequent clause, the commissioners were to determine what satisfaction any person should have in respect of any prejudice, loss, or damage sustained, for such proportion of his lands next adjoining to the navigation, as should be made use of for the purposes of the act, in case the undertakers of the navigation should not have agreed beforehand and satisfied the party so damnified. The proprietors of the navigation having brought trespass against the owner of the adjoining land, for cutting trees upon the bank of a channel made under this act, the learned Judge at the trial admitted evidence of acts of ownership exercised by the proprietors of the navigation upon other parts of the banks where the adjoining land did not belong to the defendant, and afterwards left the question to the jury, upon conflicting acts of ownership which were given in evidence; but stated, in the course of his address, that it might be assumed from the length of time that had elapsed since

the passing of the act, and from the provision that no land of any person was to be used until satisfaction was made to the owner, that some agreement had been made, by which all the land used for the purposes of the navigation, by the proprietors thereof, had been sold to them by the landowners. A rule having been obtained for a new trial, the Court *held*, first, that by virtue of the provisions of this act of the 16 & 17 Car. 2, the proprietors of the navigation did not necessarily acquire such an interest in the soil in a bank adjoining to, and formed out of the earth excavated from a new channel, made for the first time under the act, as would enable them to maintain trespass. Secondly, that, as the purchase of the soil was not necessary for any of the purposes of the act, it was to be inferred that no such purchase had actually been made; and that the improbability of any such purchase ought to have been presented to the jury. Thirdly, that acts of ownership by the proprietors of the navigation upon different parts of the bank contiguous to new channels of the navigation made under the act of Parliament, were not admissible in evidence to shew that the soil in the bank in question belonged to the proprietors of the navigation, and the rule for a new trial was made absolute. *Hollis v. Gold-fach*, 1 B. & C. 205; 2 D. & R. 316.

8. By an act of Parliament for improving a navigation, all persons who should be seised, possessed, or interested of or in any lands, tenements, or hereditaments, which should be wanted for the purpose of the act, were authorized to contract for and sell the same lands, tenements, or hereditaments, and to convey and assure the same to the commissioners appointed for executing the act, and all such persons were authorized to receive such compensation for the value of such lands, tenements, and heredi-

taments, or for any damage which should be done thereto in the execution of the works authorized to be made, as should be agreed upon by and between the commissioners and the owners and occupiers; and in case they should not agree, the amount was to be ascertained by the verdict of a jury. By another clause, reciting that, for settling all differences that might arise between the commissioners for executing the act and the several persons interested in any lands, tenements, or hereditaments, which should or might be taken and affected or prejudiced for any purposes of the act, or by reason of any of the powers thereby granted, the commissioners, in case any such persons refused to accept the compensation offered to them, were authorized to summon a jury to award the sum of money to be paid by the commissioners to the parties interested, as a compensation for the purchase of such lands, tenements, or hereditaments. The commissioners having taken for the purpose of the navigation titheable land, and covered it with water;—it was *held* that the tithe owner was not entitled to compensation. *Rea v. Commissioners of the Nene Outfall*, 9 B. & C. 875.

9. By an act for making and keeping the river Tone navigable, it was enacted, that the thirty persons therein named and their successors should be conservators of the river, and should have power to cleanse, scour, open, and keep navigable the said river; and also to cut and make new channels, if occasion should be, through the ground of other persons, making recompense to the owners. By another clause the conservators were to contract with the owners of land for the loss, or damage, which any of them should sustain by making the river navigable; and if the owners and the conservators could not agree touching the value thereof, or if the

title were in an infant, feme covert, or any other person unable to contract, then the sheriff was to summon a jury to ascertain the value, and the determination of the jury was to bind all parties; and in case the parties interested in the land should not appear, then the jury, in their absence, were to proceed to determine what satisfaction should be made to them respectively, which determination was to be good, valid, and conclusive, and to vest an estate in fee-simple in the conservators and their successors, or other right, title, or interest in the lands. By another clause it was enacted, that there should always be conservators of the said river, and that the thirty persons therein named should continue conservators during their lives, unless any of them should be removed for misbehaviour, which the major part of the conservators were thereby empowered to do, and when the number of conservators at any time, by death or removal, should be reduced to twenty, then the survivors were to choose other persons to be joined to themselves to be conservators of the river, so as to make up the number thirty; and the conservators were enabled, by the name of the conservators of the river Tone in the county of Somerset, to take and receive any gift, legacy, or grant of goods, chattels, money, or lands in fee, or for any other estate or term, for the uses aforesaid; and it was made lawful for any persons to convey any estate to the conservators and their successors, without license to alien in mortmain, and the conservators, or the major part of them, or any five of them, appointed by the major part of them to be a committee, were authorized, in writing, under their hands and seals, to make any contract, which contract should bind the whole body of the conservators, and the conservators might sue and be sued, by the said name of the con-

servators of the river Tone in the county of Somerset. By a subsequent act the conservators were authorized to make orders in writing for the government of the boatmen, bargemen, or others, in navigating boats or barges, or floating timber on the said river:—*Held*, that, as it manifestly appeared from the different clauses of these acts of Parliament, that the conservators should take land by succession and not by inheritance, although they were not created a corporation by express words, they were so by implication; and that being so, they were entitled to sue in their corporate name for an injury done to their real property.

An act of the 51 Geo. 3, for making the Bridgewater and Taunton Canal, after reciting, that the making of that canal would be very prejudicial to the tolls authorized to be levied and collected from the Tone navigation, authorized and required the Company of proprietors of the canal, within three calendar months, to contract and agree with the conservators of the river Tone navigation, and other persons, proprietors of shares or parts of shares, or otherwise interested therein, for the absolute purchase of their several and respective estates, rights, and interests in and to the same; and also to contract and agree with the overseers of the poor, for the time being, of the town of Taunton and the several parishes of Taunton St. Mary Magdalen, and Taunton St. James, for the absolute purchase of the respective estates, rights, and interests of the said town and parishes, under and by virtue of the said therein recited acts. The 51 Geo. 3 was repealed by the 5 Geo. 4:—*Held*, by *Bayley* and *Littledale*, Js., that the words “within three calendar months,” applied to both branches of the clause, and the Canal Company, therefore, were bound to have contracted within that period

with the overseers of the poor of the parishes of Taunton, and not having done so, they could not afterwards compel them to sell their interest; and, by *Parke, J.*, that whether the right to purchase that interest was limited to three months or not, at all events it was gone when the 51 Geo. 3 was repealed. *Tone Conservators v. Ash*, 10 B. & C. 349.

10. By stat. 11 Geo. 4, c. lxx, the Hungerford Market Company are empowered to purchase certain property, and the leases, &c., of premises on it; and the lessees and tenants for years, or at will, are to give up possession at three months' notice, but compensation is to be made to any such tenant required to quit before the expiration of his term. Sect. 19 provides that all tenants for years, from year to year, or at will, "who shall sustain any loss, damage, or injury in respect of any interest whatsoever for good will, improvements, tenant's fixtures, or otherwise, which they now enjoy, by reason of the passing of this act," shall be entitled to compensation, to be assessed, if necessary, by a jury.

A tenant from year to year was ejected by the Company, but received a regular half-year's notice to quit. It appeared that she had been many years in possession, and that the tenancy was not likely to have been determined if the act had not passed:—*Held*, that she was entitled to compensation for the whole marketable interest which she had in the premises at the time when the act passed; and that the good-will, though of premises on so uncertain a tenure, was protected by the act as an interest which would, practically, have been valuable as between the tenant and a purchaser, though it was not a legal interest as against the landlord.

Otherwise, where the tenancy was from year to year, determinable at three months' notice ending with the

year, and with a stipulation against underletting without leave.

In a case said to come within the protection of the act, where the Company had brought ejectment, the Court refused to stay proceedings till compensation should be made, or a jury summoned. *Ex parte Farlow*, 2 B. & Ad. 341.

11. By the stat. 11 Geo. 4, c. lxx, the Hungerford Market Company were empowered to purchase certain premises for the purposes of the act, and by sect. 6, it was enacted as follows:—That if any person interested in such premises shall for twenty-one days next after notice given him of their being required for the purposes of the act, refuse to treat, or not agree for the sale thereof, in every such case the Company shall cause the value of, and recompense to be made for such premises, to be inquired of by a jury; and for summoning and returning such jury they are empowered to issue their warrant to the high bailiff of Westminster, who is required to impanel, summon, and return such jury, and is empowered to swear twelve, and to examine witnesses before them, &c., and they shall assess the damages and recompense, &c.:—*Held*, that the Company, having given such notice to an occupier, could not withdraw from it, though they offered to pay all reasonable costs incurred by him in consequence, but that the act obliged them, on his demand, to issue their warrant to the high bailiff for summoning a jury, and the Court granted a mandamus to compel them so to do. *Rex v. Hungerford Market Company*, (*Ex parte Davies*) 4 B. & Ad. 327.

12. The act 11 Geo. 4, c. lxx (passed May, 1830), incorporating the Hungerford Market Company, empowers them to purchase certain estates; and sect. 17 enacts, that every lessee or tenant for years, or at will, of any messuage &c. to be purchased under

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the act, shall deliver up possession to the Company at three months' notice, they making compensation to every such tenant, &c., who shall be required to quit before the expiration of his term, such compensation, in case of dispute, to be assessed by a jury. Sect. 19 provides, that all tenants for years, from year to year, or at will, occupiers of any messuages, &c., forming part of the estates to be purchased, who shall sustain "any loss, damage, or injury, in respect of any interest whatsoever for good-will, improvements, tenant's fixtures, or otherwise, which they now enjoy by reason of the passing of this act," shall receive compensation from the Company by such means as are provided in respect of the tenants of certain hereditaments mentioned in a schedule to the act, namely, by assessment, as before stated. A lessee, whose term expired on the day the Company came into possession, (June the 24th, 1830), obtained leave to hold on till the premises were wanted, and did so for a year and three quarters, at the end of which time he quitted, having received half-a-year's notice. His under-tenant, who came in at Christmas, 1828, and had held from year to year, and who knew of the above proceedings, and also received notice to quit, was held entitled to compensation for good-will (to be assessed by a jury) under sect. 19. *Id.* (*Ex parte Still*), 4 B. & Ad. 592.

13. Under sects. 17 and 19 of the Hungerford Market Act (see the preceding case), compensation was claimed by a party who in 1823 became the assignee of a lease for fourteen years, granted in 1818, of premises on the estate purchased by the Company. The lease contained covenants to yield up the premises, with all fixtures and improvements, at the end of the term, and not to underlet or assign without leave; but this latter clause had not been introduced in

contemplation of any advantage to be taken of it by the landlord, with reference to the present act. The Company suffered the lease to expire, and then turned out the tenant:—*Held*, that he was entitled to have compensation assessed for the loss, if any, sustained by him in respect of good-will, or the chance of a beneficial renewal of his lease, but not for fixtures set up or purchased, or for improvements made by him, inasmuch as he had no legal interest in them:—*Held*, nevertheless, that these might be considered by the jury in estimating the chance of a beneficial renewal. *Id.*, 4 B. & Ad. 596.

14. By the act 11 Geo. 4, c. lxx, establishing the Hungerford Market Company, they are authorized to pull down certain messuages or buildings, and erect others on the site, making compensation (to be assessed, if necessary, by a jury) to the owners of any premises which may be damaged by the taking down of such messuages or buildings. The act also provided, that, for preserving uniformity in the buildings to be erected, the same shall not be subject to the provisions of the Building Act, 14 Geo. 3, c. 78, nor shall such provisions be enforced with respect to the same.

The Company having bought premises, No. 22, under the authority and for the purposes of the local act, gave notice to the tenant of the adjoining house, No. 23, pursuant to the Building Act, that the party wall between the two houses was apprehended to be unsafe, and that the owner or occupier of No. 23 was required to appoint surveyors to meet those of the Company on a day named, and certify its condition. They had afterwards leave from an agent of the tenant to make the survey earlier than the time fixed by the notice. Upon such survey the wall was condemned; and before the time first named for the survey, the Company

having served the tenant of No. 23 with the surveyor's certificate, according to the Building Act, began to pull down the wall, which was then rebuilt, and the landlord of No. 23 paid half the expense, according to the Building Act: they also pulled down and rebuilt the whole of No. 22. The tenant claimed compensation, under the local act, for losses sustained (in his business and otherwise) in consequence of the above proceedings. The only material damage, however, appearing to have resulted from the taking down of the party wall:—*Held*, that the clause excluding the operation of the Building Act did not apply to party walls between the Company's houses and those of other persons:—*Held*, also, upon the facts of the case, that the pulling down of the party wall was a proceeding not under the authority of the local act, but under the Building Act, although the parties had waived the notice given under the latter act, with respect to the time of survey. *Id.* (*Ex parte Yeates*), 1 A. & E. 668; 3 N. & M. 622.

15. Where a statute authorizes a Company to remove and erect buildings, and provides a specific remedy for parties injured by such removal and erection, the occupier of a house adjoining one which has been pulled down and rebuilt by the Company, is not entitled to such remedy in respect of an injury sustained by reason of a party wall between the two houses, after a notice given under the Building Act, although the Company may not have strictly complied with the requisitions of the Building Act in respect of such party wall. *Rea v. Hungerford Market Company*, 2 N. & M. 340.

16. Under stat. 14 Geo. 3, c. 78 (Building Act), s. 41, where a party wall has been rebuilt, the person who is owner of and entitled to the improved rent of the adjoining premises, is liable to contribution out of such rent, though

he be no otherwise owner than as an executor or administrator. And this, although there be a judgment outstanding of a date prior to the pulling down of the wall, and no sufficient assets to meet it. For the portion of the rent claimable in respect of such contribution is not assets. *Thacker v. Wilson*, 3 A. & E. 142.

17. A river navigation act provided that no proceeding to be taken in pursuance thereof should be removed by certiorari. By a subsequent statute for improving the same navigation, it was enacted, that all the powers, provisions, exemptions, rules, remedies, regulations, penalties, forfeitures, articles, matters, and things whatsoever, contained in the former act, should be in full force, and extend to and be applied and enforced as to that act, and the matters therein contained, in as full a manner, to all intents and purposes, as if therein re-enacted:—*Held*, that these were sufficient words to take away the certiorari proceedings under the latter act.

By the latter act, it was provided, that, if the undertakers of the navigation could not agree with any parties for the purchase of lands, a jury should be summoned to the quarter sessions, who should assess the purchase-money to be paid, and also what other separate and distinct sums should be paid for damages before then sustained, or for the future temporary or perpetual continuance of any recurring damages which should have been occasioned by putting the act in execution; the purchase-money and damages to be assessed separately: and that the justices in sessions should give judgment for such purchase-money or recompense as should be assessed by such jury; which verdict and judgment should be binding on all persons. By a separate clause, it was provided, that the undertakers should not be obliged to receive any complaint of damage, unless notice

were given them within six months after the damage. A jury summoned to assess compensation as above mentioned, found a verdict of £6 for value of the land taken; present damages, nothing; future damages, £2800. The judgment entered up recited, that the jury had assessed £6 for purchase-money, and no separate or distinct sum for damages before then sustained by the execution of the act; and that they had assessed the distinct sum to be paid for the future temporary or perpetual continuance of any recurring damages which should be occasioned by putting the act in execution, at £2800; and it was adjudged that the undertakers should forthwith pay the £6, and the £2800. A mandamus being moved for to the justices to amend the judgment by striking out the award of £2800, it being contended that the verdict could not legally take effect as an award of present damages under the act, none having yet been sustained:—*Held*, that as the statutes did not allow a removal of the proceedings by certiorari, the court could not indirectly bring them under review by a mandamus.

The land taken was ground upon which the owners had laid a railway, and they claimed to have their damage calculated on the assumption that the purchasers would so use the land as to destroy the railway; the latter, however, declaring that, to avoid doing so, they should make a tunnel. The damages so claimed were allowed by the jury as "future damages." *Quære*, whether the verdict so given, and entered up in the judgment as above mentioned, was legal? *Res v. The Justices of the West Riding of Yorkshire*, 1 A. & E. 563; 3 N. & M. 802.

18. A Company was empowered by statute to take certain lands, making compensation to the owners for the value of the lands, and for damage

occasioned by the taking; and it was enacted that such compensation in case of disagreement, should be assessed by a jury to be summoned by the sheriff on the Company's warrant. It was also enacted, that upon such assessment, the satisfaction for damages should be settled and ascertained separately from the value of the lands. A jury was summoned on warrant as above, stating the subject of the inquiry to be, the purchase-money to be paid for lands of I. K., and the compensation to be made to him for damages. The jury returned a general verdict for £15,000. Neither the proprietor nor the Company (unless by the form of the warrant) required a distinct assessment to be made of value and damages. This Court refused to grant a mandamus to the sheriff, at the Company's instance, to summon a jury for a new inquiry.

It being objected that, for want of a distinct assessment, the *ad valorem* duty to be put upon the conveyance to the Company could not be ascertained, the Court recommended that the finding of the jury should be specially stated in the conveyance, and duty paid as upon a purchase for £15,000. *In re London and Greenwich Railway Company*, 2 A. & E. 678; 4 N. & M. 458.

19. A Railway Company were empowered, by statute, to enter upon and use lands for the railway, and to purchase and hold lands. They were also bound to make such alterations as were necessary for the enjoyment of the railways then in use for a coal mine belonging to I., over the works of which the railway was to pass. The act was not to give them the mines under any land purchased by them, but the mine owners might work them, doing no damage to the works of the Company, or making good the same; the Company was to compensate any party interested for any damage or inconvenience sus-

tained by the execution of any of the works authorized by the act; such compensation to be assessed, if necessary, by a jury, which the Company were required from time to time to summon, and which should assess compensation for damages already sustained, and for future temporary, perpetual or recurring damages. I., being the owner of land over the said coal mine, and which land was leased to B., sold the land to the Company, the coal mine not being taken into account; afterwards B., in working the coal mine, damaged the railway, and was unable to work so profitably as he otherwise could, lest he should do further damage:—*Held*, that B. was not entitled to compensation, either for the sum which it cost him to repair the damage done, or for the interruption to the working of his mine. *Rex v. Leeds and Selby Railway Company*, 3 A. & E. 683; 5 N. & M. 246.

20. By the Liverpool and Manchester Railway Act, it was provided that the purchase-money to be given by the Railway Company for lands, &c. taken, and the compensation they were to make for damage to lands, &c., and for detriment, injury, damage, loss, inconvenience, or prejudice sustained by owners and occupiers, should be ascertained in case of disagreement, by a jury, who should assess compensation for the damages to be sustained by any person being owner or occupier of or interested in such lands, &c., for the detriment, &c., which should accrue to him by reason of the making of the railway, or of the execution of the Company's power; such damages to be settled distinctly from the value of the lands, and every tenant at will, lessee for a year, and other person in possession of lands, &c., through which the railway was intended to pass, not having any greater interest than as tenant at will, or lessee for a year, was to give

up possession at six months' notice; but where such tenant was required to give up possession before the expiration of his term or interest, the Company were to make compensation for the value of the unexpired term or interest, to be settled, if necessary, by a jury. The Company gave notice as above to a party whose lease had been several times renewed for terms of seven years, and whose landlord, at the time of the last renewal, had declined to renew for fourteen years, but assured the tenant that he would not be turned out at the end of seven. The tenant afterwards laid out money in improvements. During the seven years the landlord sold his reversion to the Company, and died:—*Held*, that the tenant had no interest for which the Company were bound to make compensation under the act. *Rex v. Liverpool and Manchester Railway Company*, 4 A. & E. 650; 6 N. & M. 186.

21. By the act of Parliament, 9 Geo. 4, c. 98, the undertakers of the Aire and Calder Navigation were empowered to make (among other works), a navigable cut or canal from the river Calder, to communicate with the river at another point, and also to construct a railroad from such cut to the highway between Leeds and Wakefield; and, for such purposes, to enter upon any lands, &c., making satisfaction as thereafter mentioned; and it was provided, that in case of any disputes or differences between the undertakers and the parties interested in the lands, &c., taken, used, damaged, or affected by the execution of any of the powers of the act, a jury should be summoned in manner therein directed, who should assess and ascertain the sum or sums of money to be paid for the purchase of such lands, &c., and also what other separate and distinct sum or sums of money should be paid by way of recompense, either for the damages, which should or

might before that time have been sustained as aforesaid, or for the future temporary or perpetual continuance of any recurring damages which should have been occasioned as aforesaid, and the cause or occasion of which should have been only in part obviated or repaired by the undertakers, and which could or would be no further obviated, repaired, or remedied by them. Other clauses provided that the Company should agree for, or cause to be valued and paid for, the lands, &c. which they were empowered to purchase within five years after the passing of the act; that they should not deviate above 100 yards from the parliamentary line, and that they should complete all their works within fifteen years. A dispute having arisen as to the value of a piece of land in which the contemplated railroad crossed the line of an existing railroad, a jury was summoned pursuant to the act, who assessed the value and the damages as follows:—Value of the land, £6; present damages, 0; future damages, £2,800. At this time the undertakers had contracted or paid for all the lands required for their works, but had not executed the works between the termini laid down in the parliamentary map, and had deviated above 100 yards from the parliamentary line, and made a cut through land of their own:—*Held*, first, that that part of the verdict which assessed the future damages was void, for that, in order to enable the jury, under the act of Parliament, to make an assessment of future damages, the cause of injury must already exist in some work of the undertakers already done. Secondly, that unless the undertakers had finally abandoned the intention of making the cut in the parliamentary line, they had a right, at any time within the fifteen years, to take possession of the land in question, on payment or tender of the £6 assessed

as its value, and that they had a right to go on simultaneously with the making both of the cut and of the railroad. *Lee v. Milner*, 2 M. & W. 824.

22. A Company were empowered by an act of Parliament to make a canal within certain limits, without specifying any time within which it was to be completed:—*Held*, that no limitation as to time could be assigned to the powers conferred, by an intendment that they were to be exercised within a reasonable time, and consequently, that the works might be resumed at any period. *Quære*, whether any and what acts would amount to an abandonment of the powers so conferred? If the capital which the act empowers the Company to raise be not raised to the full extent, *quære*, whether that circumstance affects the right of the Company to prosecute the work afterwards? The act of Parliament gave certain commissioners power to purchase lands, &c., and directed them to make compensation to persons interested therein for all damage sustained:—*Held*, that a party entitled to an easement over lands so purchased by them, could not maintain trespass for acts done upon those lands to the prejudice of his easement, but as soon as any damage was actually sustained, he ought to have claimed compensation under the act. *Thicknesse v. Lancaster Canal Company*, 4 M. & W. 472.

23. Where a statute provides that a Water-works Company shall make compensation for damages done in executing the works, and these works are restricted to a particular line, damage occasioned by executing the prescribed works is within the proviso, although the property injured be not within the line. And *semble*, that the act would protect the Company from any action at law for the injury. *Rex v. Nottingham Old Water-works Company*, 5 N. & M. 498.

24. By an act, incorporating a Company for supplying the town of N. with water, the Company were empowered to continue, make, &c., water-works, weirs, and other like works, in the parish of L., subject to the restriction after contained; and to enter upon all rivers, lands, &c., specified in the plans and books after mentioned; and to do all other things necessary for making, completing, &c., the water-works. A plan, describing the line of intended works, and the lands through which they were to be carried, and books specifying the owners of the lands, were to remain with the clerk of the peace; and the Company were not to deviate from the line described. They were empowered to agree for the purchase of lands, &c., and tenants for life, &c., and owners and occupiers of lands through which the works were to pass, were to receive satisfaction for the value of the lands and the damages sustained in making the works; the amount to be settled, if necessary, by a compensation jury, at quarter sessions, to be summoned by the warrant to the sheriff on certain notice to the Company, and not without; and the jury were to assess purchase-money or compensation, and to settle what share should be allowed to any tenant or person having a particular interest; the sessions were to give judgment for the sum awarded; and the verdict and judgment were to be registered among the records of the quarter sessions, and to be deemed records to all intents and purposes. If the verdict should exceed the amount of the Company's offer, they were to pay costs, which, if not paid, might be levied on their goods, under a justice's warrant; the amount to be ascertained by a justice. A subsequent section directed the assessment of compensation for any damages not before provided for, accruing by reason of the execution of any of the powers of the act;

the sums assessed to be levied as directed with respect to damages before provided for. The Company, on payment, tender, &c., of the sums agreed upon or assessed, might enter on the lands, &c., but not before; certain restrictions were provided, in the case of actions brought for any thing done in pursuance of the statute. The Company, by alterations in a weir in L., across a river, raised the water so as to damage a mill in L., of which T. was tenant for life; neither the mill, nor the weir or its site, nor T.'s name, was specified in the books or plan, nor was the weir in the line of works there described; but that part of the river in which the mill and weir respectively lay was in the plan:—*Held*, that a mandamus lay to the Company commanding them to issue their warrant for a jury to assess the damages sustained by T. The jury, summoned in obedience to the mandamus, having assessed a compensation, and the Company refusing to pay the same, or the costs:—*Held*, that a mandamus lay to enforce payment of the compensation, though the statute made the verdict and judgment records of the quarter sessions:—*Held*, also, that the Company, in shewing cause against the rule for a second mandamus, were precluded from contending that the injury sustained by T. was not within the act, or that all preliminaries necessary to support the first mandamus were not fulfilled. *That* all formal preliminaries essential to a verdict, must be presumed to have been fulfilled, in default of affidavit to the contrary. *That* a jury, having assessed a compensation to T., without noticing the interest of any other person, it was not to be presumed, in the absence of any affidavit that they had given such compensation for a larger interest than T. really had, or had overlooked any other person's interest. *That* if costs were recoverable at

all for the inquisition, &c., they must be believed as prescribed by the act, and that the mandamus would be for the payment, though application had been made to a justice for a distress warrant, which he had refused. *That* a mandamus would not lie for the costs of the former mandamus. *Id.*, 6 A. & E. 355.

25. A certiorari will not be granted to bring up the inquisition of a compensation jury, unless defects in the inquisitions be positively sworn to. Thus, where a statute (6 & 7 Will. 4, c. cxi) directed that a Railway Company should not take lands, unless set out in a schedule to the act, or certified by justices to have been omitted by mistake; it was held not sufficient to shew that lands, which were the subject of the inquisition, were not in the schedule, without negating the fact of the certificate. Nor to assert generally, in addition to such statement, that the act did not authorize taking the lands. Nor to allege further that certain objections were made in a protest delivered before the taking of the inquisition, which were now in general terms sworn to be true.

If the objection be to the form of the inquisition a copy should be set out, or it should be sworn that the deponent could not procure a copy; and he should, in the latter case, swear positively on information and belief. It is not enough to swear that he "objects," that the inquisition does not contain certain requisites pointed out.

The granting a certiorari is matter of discretion, though there are fatal defects on the face of the proceedings which it is sought to bring up.

It is an almost invariable rule that, where a party applying for a certiorari fails from incompleteness in his affidavits, he will not have a certiorari granted to him upon fresh affidavits supplying the defect; as in the case of the defects above-mentioned; especially if he appears to have suffered

no injury, or to have assented to the proceedings below:—*Semble*, per Lord Denman, C. J., that the rule requiring that, in proceedings by an inferior jurisdiction, the facts giving the jurisdiction should appear on the face of such proceedings, is not confined to facts necessarily within the knowledge of the party exercising the jurisdiction. *Reg. v. Manchester and Leeds Railway Company*, 8 A. & E. 413; 3 N. & P. 439; 1 P. & D. 164.

26. On application for a certiorari, the Court will take into consideration the conduct of the party applying.

A party, whose land had been taken under the South Holland Drainage Act, 57 Geo. 3, c. lxxix, applied for a certiorari to bring up the inquisition held before a compensation jury, on the grounds, 1st, That the inquisition did not state such a notice to treat for compensation as was requisite under the act to give jurisdiction; 2nd, that the jury had ordered a fence to be erected for the benefit of the applicant, in addition to a money compensation, instead of giving him the whole compensation in money; 3rd, That the applicant held in right of his wife, and that the tenure was copyhold, and no compensation was made to the wife or lord. The Court refused a certiorari, it appearing, on affidavit, 1st, that the applicant had consented to waive the notice, and requested that the jury might be summoned for a day too near to admit of proper notice under the act; 2nd, that he had discussed the amount of compensation proper to be given, upon the supposition of the fence being erected; and 3rd, that he did not now swear to his belief that the jury had awarded less money in consequence of the award as to the fence; 4th, that, in the dispute respecting the land, he had not mentioned his wife's interest, or the nature of the tenure, but had acted as if the property was his own freehold. *Reg. v.*

The Committee-Men for the South Holland Drainage, 8 A. & E. 429.

27. By a statute (6 & 7 Will. 4, c. 126) empowering trustees of a harbour to purchase lands for certain purposes, it was enacted, that, in case of difference between the trustees and any landholder as to compensation, and if the same could not be agreed for, or the landholder should refuse &c. to treat, after twenty-one days' notice, the trustees might issue their warrant to the sheriff to summon a jury, who should appear before the justices at quarter sessions, and should there assess the compensation, and the justices should accordingly give judgment for the same; and that the verdict and judgment should be kept by the clerk of the peace among the records of sessions, and should be deemed records; also that, if the verdict should be for a sum exceeding, or the same as, that offered by the trustees, they should pay costs to the landholder; if for a less sum, then the costs should be borne equally by the parties: such costs, if necessary, to be recovered under a justice's warrant of distress; the amount to be ascertained by a justice. The trustees offered money for certain land; the landholder did not accept it, but desired that the amount might be settled by a jury. In the mean time, at their request, he consented that they should take possession, agreeing to pay him interest on the amount of the future compensation. The inquiry was held, and compensation assessed. An inquisition was drawn up, purporting to be taken at sessions under the statute, and stating that, the trustees and landholder appearing by their counsel, the jurors, being sworn to inquire of the purchase-money of the lands (specified) and recompense for damage, did assess and give a verdict for the sum of &c. for the land, and the sum of &c. for damage; whereupon the said

Court did adjudge and order the said sums to be paid by the trustees. On cross motions for a mandamus to pay, and a certiorari to bring up the inquisition:—*Held*, that the non-statement in the inquisition of any preliminary requisite to the taking of it (as twenty-one days' notice to treat) could not be insisted upon by the trustees, whose business it was to institute the proceedings. That the fact of differences having existed sufficiently appeared by the inquisition. That the inquisition was not irregular in omitting to state whether or not the sum assessed exceeded or equalled the sum offered by the trustees.

The Court granted a mandamus, and discharged the rule for a certiorari. *Per Littledale, J.*, the statute requiring no regular form of an inquisition, the enactment that such inquisitions should be kept among the records of sessions, and should be records, did not render it necessary to draw them up with the formality required in setting out the judgment of an inferior court. *Reg. v. The Trustees of Swansea Harbour*, 8 A. & E. 439.

28. By a canal act, 30 Geo. 2, c. 82, s. 7, the owners of certain works called the Pentyrch Works, were entitled to all the surplus water, or such as was not wanted for the purposes of the canal. By a subsequent act, 36 Geo. 3, c. 69, the Canal Company were required to finish the canal, and all the works and extension of the same, within the space of two years, and were restricted from making any alterations in the canal after the expiration of that time. After the expiration of the two years, the Canal Company erected an engine for the purpose of forcing up water into the canal, by which the quantity of water was increased, and the Company were enabled to pass down a greater number of barges than could have been passed down before the erection of this engine:—*Held*, that this having

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had the effect of diminishing the quantity of surplus water, in consequence of the increased trade, was an injury to the owners of the Pentyrch Works, for which they were entitled to recover consequential damages.

The 30 Geo. 3, c. 82, s. 7, also provided for the purpose of better securing the surplus water for the benefit of the Pentyrch Works, that the lock which should be made below, and nearest to the Pentyrch Works, should always be kept in good and sufficient repair by the Canal Company, for the purpose of preventing leakage or waste of water, &c. The Canal Company constructed a notch for the purpose of conveying water below the lock directed to be kept in repair:—*Held*, on the construction of this section, (*Parke, B., dubitante*), that the Company had no right to pass any water below the lock, though necessary to the lower part of the canal, except that which necessarily passed by barges being lowered through the lock, and that the notch was not authorized by act of Parliament. *Blakemore v. Glamorganshire Canal Company*, 2 C., M. & R. 133.

COMPETING LINES.

See AGREEMENT, 1, 3.
RATING, 12, 18.

COMPUTE, RULE TO.

See ACTION, 19.

CONSTRUCTION OF STATUTES.

See LIMITATION OF ACTIONS.

PUBLIC.

RATING, 25, 44.

TOLLS, 5.

(*Equity*).

1. By a railway act it was enacted, that if the Railway Company should be desirous of purchasing part of any house, garden, yard, warehouse, building, or manufactory, and the owner

CONSTRUCTION OF STATS.

should signify his inclination to sell the whole of such house, garden, yard, &c. he should not be compelled to sell the Company part only, or less than the whole of such house, garden, yard, &c.:—*Held*, that a yard for bonding foreign timber, in which there was a deal shed, and two buildings containing saw pits, was not a yard within the meaning of the enactment. *Stone v. Commercial Railway Company*, 9 Sim. 621.

2. When a Company, empowered by act of Parliament, has given notice to an owner of land to treat for the purchase of a part of it, but the owner and the Company cannot agree upon the terms, and the Company therefore issues a precept to the sheriff to summon a jury to assess the value of the part of the land which is described in the precept as being that of which the jury are to assess the value, it must be neither less nor more than that for the purchase of which the owner has been already required by the notice to treat. *Id.*, 4 My. & Cr. 122.

3. Principles upon which the Court will exercise its jurisdiction over bodies to whom Parliament has given powers of making compulsory purchases of land:—*Semble*, that the Court will not allow such bodies to avail themselves of the parliamentary powers, by taking land which they do not require for a *bond fide* purpose, sanctioned by their act of Parliament:—*Semble* also, that although an attempt to obtain possession of land has been in the first instance made under color of the powers of an act of Parliament, when not really required for the *bond fide* purpose of the act, yet, if the land afterwards becomes really necessary or desirable for such *bond fide* purposes, the Court will not interfere to prevent its being taken. *Webb v. Manchester and Leeds Railway Company*, 4 My. & Cr. 116.

4. Construction of the Glamorganshire Canal acts, principles applicable

to the construction of acts of Parliament establishing public Companies, with extraordinary powers for the execution of works of local or general utility. *Blakemore v. Glamorgan-shire Canal Navigation*, 1 My. & K. 154.

5. Upon the construction of a railway act:—*Held*, that the costs given by the act in relation to the payment of certain dividends had reference to the costs of obtaining the order for payment, and not to the costs of the payment itself. *Ex parte Athorpe*, 3 Y. & C. 396.

6. Acts of Parliament for making canals, railroads, &c. are powers given by Parliament over the lands of the different proprietors through whose estates the works are to proceed. Each proprietor, therefore, has a right to have the power strictly and literally fulfilled as regards his own lands; and also a right to require that no variation shall be made to his prejudice. But when the act of Parliament is faithfully carried into execution as regards his lands, he cannot on the mere ground of a variation which is not injurious to himself, and was made with the consent of others, obtain from a Court of equity an injunction to stay proceedings. *Lee v. Milner*, 2 Y. & C. 611; and see 2 M. & W. 824.

7. Where, under a railway act, the Company are liable to the expenses of "all purchases" to be made by virtue of the act; this will include the expenses of investing the money in the funds, previously to its being laid out in lands, to be settled to the like uses as the land purchased by the Company. *Ex parte the Bishop of Durham*, 3 Y. & C. 690.

8. By a railway act, it was enacted, that in case any question should arise as to the title of the lands to be taken or used for the purposes of the act, the party in possession at the time of the purchase should be deemed to be lawfully entitled until the contrary

should be shewn to the satisfaction of the Court; and it was further enacted, that in case the proprietor or other party interested in the land, and entitled to receive the purchase-money, should be unable to make a title to the land, it should be lawful for the Company to pay the money into Court to the credit of the party interested, subject to the disposition of the Court, and thereupon the Company's title should be deemed complete. Under this act, the Company having contracted to purchase a piece of land of the party in possession, and having entered into possession under the contract, objected to the title, and paid the money into Court to the credit of the party to whom they had so contracted:—*Held*, that such party, upon his own affidavits of title, was entitled to payment of the money out of Court to his own absolute use. *Ex parte Grainge*, 3 Y. & C. 62.

(Law).

9. Where a statute points out the particular manner in which a Canal Company shall sell and convey lands, and enacts that every such sale and conveyance shall be valid and effectual to all intents and purposes, this does not cure any defect in the title to lands so sold and conveyed by the Company. *Ward v. Scott*, 3 Camp. 284.

10. An act of Parliament, private in its nature, is not made admissible in evidence against strangers by a clause, "declaring that it shall be deemed and taken to be a public act, and shall be judicially taken notice of without being specially pleaded." A canal act is not rendered a public act by containing provisions, empowering the Company to regulate and take tonnage rates and tolls from persons using the canal. *Brett v. Beales and others*, 1 M. & M. 421.

11. Where a canal is made pursuant to act of Parliament, the right of the proprietors to toll is derived entirely

from the act; and is to be considered as if there was a bargain between them and the public, the terms of which are expressed in the statute; and the rule of construction is, that any ambiguity in the terms of the contract must operate against the Company of adventurers, and in favour of the public. The proprietors, therefore, can claim nothing which is not clearly given to them by the act. A canal was formed upon two levels, which were connected by a chain of locks; upon the upper level there was no lock whatever. By the act of Parliament for making the canal, all persons were to be at liberty to navigate thereupon with boats, upon payment of such rates and dues as should be demanded by the Company, not exceeding the rates therein mentioned; and, by another clause, the Company were authorized to take certain rates and duties for every ton of iron and other goods navigated on any part of the canal, and which should pass through any one or more of the locks; and power was given to the owners of adjoining lands to use pleasure boats on the canal, without paying dues, so as the same did not pass through any lock, and were not used for carrying goods:—*Held*, that this gave no right to demand toll for boats navigating the upper level of the canal, in which there were no locks. *Stourbridge Canal Co. v. Wheeley*, 2 B. & Ad. 792.

12. A river navigation act directed that the salary of the clerk to the commissioners should be paid by the proprietors of the tolls. A person seised in fee of a part of the navigation tolls, granted annuities, and conveyed her part of the tolls, &c. to a trustee, to secure the annuities, and to permit her to hold the conveyed premises and the profits thereof to her own use, till default in payment of such annuities: by a subsequent deed she conveyed the premises in fee to Y., together with

other property, in trust to sell as in the deed was directed, and to receive the proceeds of such sale, and the tolls and profits of the navigation; and out of the several receipts and profits, to defray the costs and expenses necessary for carrying the trusts into effect, to pay up, and, if possible, discharge the annuities, to pay off certain creditors, and to hold the surplus, if any, to her benefit. The trustee under the last-mentioned deed entered into receipt of the tolls, appointed a collector, and represented himself to the commissioners as a mortgagee of the tolls, and as having a control over them, and over the repairs of the navigation, but refused to pay the salary of the clerk: the annuities were still subsisting. The clerk sued the trustee for the non-payment of his salary:—*Held*, that it lay upon the trustee, having conducted himself as above stated, to shew that he was not a proprietor within the meaning of the act:—*Held*, further, on reference to the several deeds, that he was such proprietor, although he only held the tolls in trust to pay creditors and discharge incumbrances, and although there was a legal estate outstanding in a trustee to secure the annuities. The acts, passed in 1794, required that certain notices should be given in the Northampton and Cambridge newspapers. There was at that time one newspaper published at each place. A newspaper was subsequently established, called the Huntingdon, Bedford, and Peterborough Gazette, and Cambridge and Hertford Independent Press, and it was published, among other places, at Cambridge:—*Held*, that publication of the notices in the former papers was sufficient. *Tibbits v. Yorke*, 5 B. & Ad. 605.

13. An act of Parliament, authorizing trustees to improve public streets, and to sell waste lands to defray the expenses of such improvements, and to use the money arising from such sales

in such manner as they shall think fit for the carrying the purposes of the act into execution, does not authorize them to expend such money in the opposition of a bill in Parliament, which, if passed, would turn out disadvantageous to the purposes of the former act. *Edwards v. Wilson*, 2 Chitty, 610.

14. *Held*, construing the statutes 8 Geo. 3, c. lxiii, and other statutes, to 1 Geo. 4, c. xlviii, that the Canal Company are not bound to deepen and enlarge the Forth and Clyde Canal, or any part of it, to the depth of ten feet; and that they are not bound to alter, enlarge, and deepen that part of the said canal extending from Port Dundas to St. Rollox Works, so as to be of the same depth and dimensions with the remainder of the collateral cut, and of the other parts of the main canal. *Tennant v. Forth and Clyde Canal Navigation Company*, 1 Rob. App. Ca. 30.

15. An act of Parliament empowered a Canal Company to construct certain canals and railroads, paying compensation to the owners of lands used; and also to make railroads to iron-works, &c. within eight miles of the canals or railroads first mentioned; and it provided that, if the owners of certain species of property situate within eight miles from any part of the canals or railways before particularly described and authorized to be made, should think it expedient that railways should be made through the lands of other persons, for the purpose of conveying goods from the canals or railways before particularly described; and if the Company should refuse to make such railways, under the powers given them by the act, such owners might, at their own cost, make the railways, paying compensation to the proprietors of the lands over which they were to be made; and that the railways so made should

be open to the public on payment of such tolls as the Company should demand. A subsequent act incorporated a Tramroad Company, and gave them, or the Canal Company, power to make certain railways, and to take thereon the tolls authorized by the former act; and it provided, that the Companies should have the same powers for recovering the tolls as were given by the first act; and that the several clauses, powers, authorities, regulations, limitations, exemptions, restrictions, privileges, penalties, forfeitures, punishments, and provisions therein contained, should, as far as the same would apply and the case would admit, extend to the works constructed under the new act, and should take effect, operate, and be put in execution, and used and exercised, and be applied and enforced, in respect of the making, maintaining, and using the said works, and regulating the conveyance of goods thereon, for punishing offences relating thereto, and for purchasing and selling lands, and ascertaining the value thereof, and determining and assessing damages, and with respect to all matters whatsoever in anywise concerning the works made under the new act, as fully and effectually, to all intents and purposes, as if the same clauses, &c. had been repeated and enacted in the new act, and as if the works authorized by the new act had been part of the undertaking authorized by the first act, and as if the Tramroad Company had been therein named instead of the Canal Company:—*Held*, that this did not authorize owners of the specified kind of property within eight miles of the new works (unless authorized by the first act) to make railways, &c. from their property to the new works. *Sirhowy Tramroad Company v. Jones; Homfray v. Jones*, 3 A. & E. 640.

CONTRACT.

See AGREEMENT.

CONVEYANCE.

LEASE, 1.

PRINCIPAL AND SURETY.

PROPRIETORS, 1, 6.

SHARES, 4.

TOLLS, 3.

VENDOR, 3.

CONVENIENCE.

See EASEMENT.

CONVEYANCE.

See LEASE, 2.

Under a local act, proprietors of land were authorized to "contract for, sell, and convey" their lands to a Canal Company; such contracts, agreements, sales, exchanges, conveyances, and assurances, "were to be valid to all intents and purposes," were to be enrolled with the clerk of the peace, and copies thereof to be evidence; and upon payment of the sum agreed on for the purchase of lands, such lands were to be vested in the Canal Company:—*Held*, that a conveyance of land under this act must be in writing. *Doe d. Robins v. Warwick Canal Company*, 2 Bing. N. C. 483.

CORONER.

1. Where a death occurs in the county of W., from an injury received in the county of S., the coroner's inquest is rightly held in the county of W. *Quare*, whether a deodand can be levied under a coroner's inquisition, which sets out that the death was caused by the negligence of the party on whom the deodand is assessed? *Reg. v. The Grand Junction Railway Company*, 3 P. & D. 57.

2. A coroner's jury had found that the death of A. was occasioned by means of a locomotive engine of B. being driven against him, and that the same did feloniously cast to the

ground the said A.:—*Held*, not a sufficient description of the cause of the death of A.

Some of the jurors being marksmen, and their marks not being attested, the inquisition was held bad on that ground also. *Reg. v. Stockton and Darlington Railway Company*, 8 Dowl. 516.

CORPORATION.

See ACTION, 15, 17.

(Equity).

1. An incorporated Company will be bound by the agreement of its individual members acting before incorporation on its behalf, if the Company has received the full benefit of the consideration for which the agreement stipulated on its behalf. *Edwards v. Grand Junction Railway Company*, 1 My. & Cr. 650.

2. A Court of equity will not, at the instance of a shareholder, restrain a joint-stock Company, incorporated by acts of Parliament, which prescribe its constitution and objects, from applying in its corporate capacity to Parliament, and from using its corporate seal and resources to obtain the sanction of the legislature to the remodelling of its constitution, or to a material alteration and extension of its objects and powers. *Ware v. Grand Junction Water-works Company*, 2 Russ. & My. 470.

(Law).

3. A corporation must prosecute criminally in their corporate name; and the addition of such name, as a description of the persons of which the corporation is composed, is not sufficient in an indictment. *Rex v. Patrick*, 1 Leach, C. C. 253; 2 East, P. C. 1059.

4. The "mayor, aldermen, and commons, in common council assembled," are not sufficiently described in the proceedings under a private act of

Parliament, by "the mayor and commonalty and citizens," though in fact the latter include the former. *Rez v. Croke*, Cowp. 29.

5. Though the affixing of the common seal to the deed of conveyance of a corporation be sufficient to pass the estate, without a formal delivery, if done with that intent, yet it has no such effect if the order for affixing the seal be accompanied with a direction to their clerk to retain the conveyance in his hands till accounts were adjusted with the purchaser. *Derby Canal Company v. Wilmot*, 9 East, 360.

6. By an act for making and keeping the river Tone navigable, it was enacted, that the thirty persons therein named, and their successors, should be conservators of the river, and should have power to cleanse, scour, open, and keep navigable the said river; and also to cut and make a new channel, if occasion should be, through the ground of other persons, making recompense to the owners. By another clause, the conservators were to contract with the owners of land for the loss or damage which any of them should sustain by making the river navigable; and if the owners and the conservators could not agree touching the value thereof, or if the title were in an infant, feme covert, or any other person unable to contract, then the sheriff was to summon a jury to ascertain the value, and the determination of the jury was to bind all parties; and in case the parties interested in the land should not appear, then the jury, in their absence, were to proceed to determine what satisfaction should be made to them respectively, which determination was to be good, valid, and conclusive, and to vest an estate in fee-simple in the conservators and their successors, or other right, title, or interest in the lands. By another clause it was enacted, that there should always be conser-

vators of the said river, and that the thirty persons therein named should continue conservators during their lives, unless any of them should be removed for misbehaviour, which the major part of the conservators were thereby empowered to do; and when the number of the conservators at any time, by death or removal, should be reduced to twenty, then the survivors were to choose other persons to be joined to themselves, to be conservators of the river, so as to make up the number thirty; and the conservators were enabled, by the name of the Conservators of the river Tone in the county of Somerset, to take and receive any gift, legacy, or grant of goods, chattels, money, or lands, in fee, or for any other estate or term, for the uses aforesaid; and it was made lawful for any persons to convey any estate to the conservators and their successors, without license to alien in mortmain; and the conservators, or the major part of them, or any five of them, appointed by the major part of them to be a committee, were authorized, in writing under their hands and seals, to make any contract, which contract should bind the whole body of the conservators, and the conservators might sue and be sued by the said name of the Conservators of the river Tone in the county of Somerset. By a subsequent act, the conservators were authorized to make orders in writing for the government of the boatmen, bargemen, or others, in navigating boats or barges, or floating timber on the said river:—*Held*, that as it manifestly appeared from the different clauses of these acts of Parliament that the conservators should take by succession, and not by inheritance, although they were not created a corporation by express words, they were so by implication; and that being so, they were entitled to sue in their corporate name for an injury done to their real property.

An act of the 51 Geo. 3, for making the Bridgwater and Taunton canal, after reciting, that the making of that canal would be very prejudicial to the tolls authorized to be levied and collected from the Tone navigation, authorized and required the Company of proprietors of the canal, within three calendar months, to contract and agree with the conservators of the river Tone navigation, and other persons, proprietors of shares or parts of shares, or otherwise interested therein, for the absolute purchase of their several and respective estates, rights, and interests in and to the same; and also to contract and agree with the overseers of the poor for the time being of the town of Taunton, and the several parishes of Taunton St. Mary Magdalen and Taunton St. James, for the absolute purchase of the respective estates, rights, and interests of the said town and parishes, under and by virtue of the said therein recited acts. The 51 Geo. 3 was repealed by the 5 Geo. 4:—*Held*, by *Bayley* and *Littledale, Js.*, that the words, "within three calendar months," applied to both branches of the clause, and that the Canal Company therefore were bound to have contracted within that period with the overseers of the poor of the parishes of Taunton, and not having done so, they could not afterwards compel them to sell their interest; and by *Parke, J.*, that whether the right to purchase that interest was limited to three months or not, at all events, it was gone when the 51 Geo. 3 was repealed. *Conservators of the River Tone v. Ash*, 10 B. & C. 349.

COSTS—EXPENSES.

See ACCOUNT, 2.

ACTION, 14.

COMPENSATION, 6, 24.

CONSTRUCTION OF STATUTES, 5,
7, 13.

COSTS—EXPENSES.

DEDUCTIONS.

DOCK, 1.

INVESTMENT.

LIMITATION, 1.

PURCHASE MONEY, 1, 3.

TOLLS, 10, 11.

(*Equity*).

1. Where under the provisions of a railway act lands are purchased by the Company, of corporations, tenants for life, &c., the costs of an application to the Court to have the purchase-money applied in the discharge of incumbrances, will be directed to be paid by the Company, although the act only makes an express provision for such costs in cases where the money is to be laid out in the purchase of lands to be settled "to the like uses." *Ex parte Trafford, re Liverpool and Manchester Railway Act*, 2 Y. & C. 522.

2. Where an act of Parliament establishing a Railway Company authorised them to purchase lands of corporations, tenants for life, &c., and directed that the purchase-money should be applied in the redemption of the land tax upon other parts of the property unsold:—*Held*, that a tenant for life who had redeemed the land tax before the passing of the act, might reimburse himself out of the proceeds of the lands purchased of him by the Company. The costs of an application to the Court under such an act of Parliament, to have the purchase-money applied in the redemption of the land tax, will be allowed out of the purchase-money, although the act only makes an express provision for such costs in cases where the money is to be laid out in the purchase of lands to be settled to the like uses. *Ex parte Northwick*, 1 Y. & C. 166.

3. "Costs in consequence of the purchase" held not to carry costs of the interim investment in the funds. *Ex parte Hirst*, 4 Y. & C. 468.

(Law).

4. By a canal act the Company were authorized to take certain lands for the purposes of the act, on making certain payments, either by annual rents or sums in gross; and the persons from whom the land was to be taken were empowered to distrain the goods of the Company, even off the premises, in case of non-payment of such sums. An avowant, stating a distress under this act of Parliament, is not entitled, on obtaining a verdict, to double costs under the stat. 11 Geo. 2, c. 19, s. 22. *Leominster Canal Company v. Norris*, 7 T. R. 500; *Same v. Cowell*, 1 B. & P. 213.

5. Where the jury find an insufficient verdict, upon which the Court can give no judgment, and a new trial is granted, the party ultimately successful is not entitled to the costs of the former trial. *Worcestershire Canal Company v. Trent and Mersey Navigation Company*, 2 Marsh. 475.

6. Plaintiffs, an Irish Company, whose concerns were all carried on in Ireland, were compelled to give security for costs, notwithstanding an affidavit that they had money in a banker's hands in London, and that many of the members resided in England. *Limerick and Waterford Railway Company v. Fraser*, 4 Bing. 394; 1 M. & P. 23.

7. By one section of an act of Parliament, it was enacted, that money allowed by commissioners of a navigation to their clerk, appointed by them, should be paid by the proprietors of the tolls on the navigation in certain proportions. A subsequent section enacted that, if any proprietor should neglect or refuse to pay on demand made either of him or his agent, the money might be recovered by action of debt, &c., with double costs, in the clerk's name, against such proprietor, or, if he could not be found, against his agent or otherwise. The sum might be levied by distress upon

the goods of the proprietor, or, if no such goods could be found, on the goods of his agent. The clerk obtained a verdict in debt against a proprietor, on an issue of nil debet, but had averred no demand in the declaration:—*Held*, that the right of action was given by the two sections conjointly; that the demand, if necessary to the action, must be presumed after verdict; and, therefore, that the declaration must be considered as framed, and the verdict recovered under both sections, and that the plaintiff was entitled to double costs. *Tibbitts v. Yorke*, 4 A. & E. 134.

8. A local act empowered certain trustees to purchase messuages, &c., and enacted that if the owners should not agree with the trustees on the terms, or should neglect or refuse to treat, or by reason of absence or disability should be prevented from treating, the trustees should cause a jury to be summoned by the sheriff to assess compensation, and the sheriff should summon and examine witnesses upon oath, and if the jury should give a verdict for more than the trustees had offered, the costs and expenses of summoning and returning such jury and witnesses, and also of the inquest, to be settled by a justice, were to be borne by the trustees, and recovered by the persons entitled thereto, by distress; but if the verdict should not be for more than the sum offered, the trustees were to bear one moiety of the costs and expenses aforesaid, and the other party the other moiety; but where parties from absence or inability could not treat or agree, such costs and expenses were to be borne by the trustees; and afterwards it was enacted that, in a particular event, messuages, &c. should be sold to certain parties, and that, in case of disagreement as to price, the price should be assessed by a jury as before, and the expense of hearing and determining such difference be borne in like

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manner:—*Held*, that an owner of lands to be purchased, in favour of whom a jury awarded more than the sum offered, was entitled to the costs of the inquiry, including witnesses, attendance by attorney at the inquest, conferences, and briefs, and not merely to the expenses of the sheriff and jury; but that the expenses of surveyors, merely as such, could not be included in the costs. *Rez v. The Justices of the City of York*, 1 A. & E. 828; 3 N. & M. 625.

9. A railway act, 4 & 5 Will. 4, c. xxv, made provision for summoning a jury to assess compensation in case of disagreement respecting the purchase of lands, and it enacted that, if the jury should award a higher sum than had been offered by the Railway Company, "all the costs of summoning such jury, and the expenses of witnesses," should be paid by the Company; if for a lower sum, then one moiety of such costs by each of the litigant parties. The next section provided that all parties disputing with the Company and demanding to have compensation assessed by a jury, should oblige themselves by bond to bear their proportion (if any) "of the costs and expenses of summoning and returning such jury and taking such verdict, and of the summoning and attendance of witnesses:"—*Held*, that these clauses did not entitle the successful party to general costs of the inquiry, such as might be recovered in an action by the party gaining a verdict; not, therefore, to costs of drawing brief, counsel's fee, solicitor's charges for attending the inquiry, a surveyor's charges (except an allowance for time and travelling expenses) for viewing and valuing. Although by the clause giving the jury process, and regulating the inquiry, it was enacted that, in such inquiry, the party claiming compensation should "be deemed to be plaintiff, and entitled to the same rights and

privileges as plaintiffs in actions at law." *Rez v. Gardiner*, 6 A. & E. 112; 1 N. & P. 308.

10. In an action against a Navigation Company incorporated by statute, the declaration contained several counts, charging several wrongful acts of diversion, &c. of the plaintiff's water-course; to which the defendants pleaded not guilty, and also several special pleas; the defendants had a general verdict on the plea of not guilty. The act of incorporation contained a clause giving the Company treble costs on a verdict for them in an action for any thing done in pursuance of the act; and enabling them, in such case, to plead the general issue, and give the act and the special matter in evidence. It appeared that the acts complained of in two of the counts of the declaration, were acts which the Company were prohibited by the statute from doing:—*Held*, that the defendants were not entitled to treble costs on those counts.

The proper mode of taxing treble costs for a defendant, where the plaintiff succeeds on some issues, is first, to calculate the defendant's single costs, then treble them, and then deduct the plaintiff's costs from the amount so trebled. *Wilson v. River Dun Navigation Company*, 5 M. & W. 89; 7 Dowl. 369.

11. A defendant is entitled to security for costs, from a plaintiff resident out of the jurisdiction, although he has no defence on the merits. The possession of money and Exchequer bills, within the jurisdiction, will not relieve a plaintiff resident out of the jurisdiction, from giving security for costs, notwithstanding the 1 & 2 Vict. c. 110, s. 12. A defendant does not preclude himself from applying for security for costs, by agreeing, before issue joined, to take short notice of trial generally, and not for a specific day. *Edinburgh and Leith Railway Company v. Dawson*, 7 Dowl. 573.

12. By the Building Act, 14 Geo. 3,

c. 78, s. 100, it is enacted, that if the plaintiff be nonsuited, the defendant shall have judgment to recover treble costs. *Semble*, that in such a case it is not necessary for the defendant to enter a suggestion on the roll to entitle himself to treble costs. *Wells v. Ody*, 2 C., M. & R. 184.

COVENANT.

See LEASE, 1.

TOLLS, 1.

WORKS, 3.

(Equity).

1. The Monmouthshire Canal Act provided that upon auxiliary railroads made by private individuals under the authority of the act, the tolls should not exceed the rate charged by the Canal Company, which, for the articles of limestone and ironstone, was restricted to 2½d. a ton per mile; and it also empowered the Canal Company, by agreement with the landowners, itself to construct auxiliary railroads, on which tolls not exceeding 5d. a ton per mile might be charged. Certain landowners and owners of iron works, and among others the lessees of the Beaufort works, formed a joint-stock Company, and, under the powers given by the act, constructed a railroad connecting a lime quarry, called the Trevil Quarry, with the several iron works and with the railroads of the Canal Company. In the partnership deed of the Railroad Company the lessees of the Beaufort works covenanted for themselves, their heirs, executors, administrators, and assigns, with the other shareholders, their executors, administrators, and assigns, so long as the covenantors, their executors, administrators, or assigns, should occupy the Beaufort works, to procure all the limestone used in the said works from the Trevil Quarry, and to convey all such limestone, and also all the ironstone from the mines to the said works along the Trevil railroad, and to pay a toll of 5d. a ton per mile

for the same. Upon a bill filed by the shareholders of the railroad to enforce this covenant against a person who had purchased the Beaufort works with notice of the partnership deed:—*Held*, 1st. That the covenant did not run with the land so as to bind assignees at law, and that a Court of equity would not by holding the conscience of the purchaser to be affected by the notice, give the covenant a more extensive operation than the law allowed to it. 2nd. That the covenant securing a toll of 5d. a ton per mile to the shareholders of the Trevil railroad was a fraud upon the Canal Company and the legislature, and therefore ought not to be specifically enforced by injunction.

Some of the shareholders having been made co-plaintiffs in the bill without their privity or consent, on their application an order was made with costs, that their names should be struck out as plaintiffs. *Keppell v. Bailey*, 2 My. & K. 517.

(Law).

2. Covenant by the reversioner against the assignee of the grantee. Declaration stated that A. and B. did grant license for a term of years to C., to continue a channel open through the bank of a navigation, in order that the waste water might pass through the channel to the mills of C., the latter paying a certain annual sum therein mentioned. Breach, non-payment of that annual sum. *Semble*, that upon the face of the declaration, A. and B. must be considered as having the sole ownership of the navigation, and the sole power of granting this privilege; and, in that case, that the deed would operate as the grant of an interest in an hereditament, and that the assignee of the grantee would be liable to an action by the reversioner within the statute 32 Hen. 8. By the deed produced in evidence, A. and B. were described as persons having the greatest proportion or share in the profits of the navigation:—*Held*, that

by this deed it appeared, that the grantors had not the power of granting the privilege of which the deed, as set out in the declaration, purported to be a grant, and, therefore, that there was a variance:—*Held* also, that the deed shewed that the assignees of the grantee was not bound by the covenants, inasmuch as it appeared that the grantors had not any legal or equitable estate in the real hereditament which the deed set out in the declaration purported to be a grant. *The Earl of Portmore v. Bunn*, 1 B. & C. 694; 3 D. & R. 145.

3. A Canal Company were empowered by act of Parliament to raise money on the security of the canal and dues, the creditors to have no priority over each other. By the form of deed given in the act authorizing the undertaking, the canal and dues were assigned to the lenders as a security for the principal money lent, the interest on which was to be paid half-yearly:—*Held*, that an action of covenant for payment of interest did not lie against the Company in such deed. *Pontet v. Basingstoke Canal Company*, 3 Bing. N. C. 433.

CREDIT.

See ACTION, 5.

CROWN.

If the sea, or an arm of the sea, by gradual and imperceptible progress, encroach upon the land of a subject, the land thereby covered with water belongs to the Crown. *In re The Hull and Selby Railway Company*, 5 M. & W. 327.

DAMAGE.

See CARRIER.

COMPENSATION.

DOCK, 8.

LIMITATION, 4.

MANDAMUS.

MINES, 1, 3, 4.

NAVIGATION.

Circumstances under which two defenders were held (approving the

judgment of the Court of Session) bound under an agreement with a pursuer in mutual relief of a claim of damages, although it was afterwards proved, that neither party was the cause of the damage. *Johnston v. The Edinburgh and Glasgow Union Canal Company*, 1 Shaw & Macl. 117.

DEBT.

See ACTION, 11, 12.

DEDUCTIONS.

See RATING, 3, 28, 29, 31, 35, 37, 40, 46.

DEED.

See CORPORATION, 5.

COVENANT, 2.

PROPRIETORS, 1.

When the profert of a deed is requisite, it is not sufficient to allege as an excuse, "that the deed was delivered to the opposite party." *Wallis v. Harrison*, 4 M. & W. 538.

DEMAND AND REFUSAL.

See MANDAMUS, 7, 8, 10, 12.

DEMURRER.

See PLEADING.

1. Demurrer, for want of equity, to a bill by a shareholder in a Canal Company to restrain employment of its funds for converting the canal into a railroad, overruled. *Maudsley v. Manchester Canal Company*, Coop. Ch. Ca. 502.

2. Pending a notice of motion for a special injunction, the defendant put in a demurrer:—*Held*, that the demurrer must be set down and argued instant. *Anon. v. The Bridgewater Canal Company*, 9 Sim. 378.

3. Bill filed on bonds given by incorporated Company to pay money borrowed by them under authority of act of Parliament, which gave lenders a lien on profits of Company:—*Held*, not to be demurrable, on ground that the plaintiff's remedy was at law. Where demurrer has been over-ruled, and the

time allowed by Court for defendant to plead has meanwhile expired, Court will allow defendant to plead and give further time. *Duncan v. Manchester Water-works Company*, 8 Price, 697.

4. Demurrer to bill by annuitant against an incorporated Company and their clerk, for a discovery of funds not appropriated, overruled on account of clerk joining in demurrer. *Gibbons v. Waterloo Bridge Company*, 5 Price, 491.

DEVIATION.

See AGREEMENT, 1.
ISSUE AT LAW.

The undertakers of the Aire and Calder Navigation were empowered by act of Parliament to make a canal and tramroad leading therefrom, and fifteen years were given to them to complete the works. At the expiration of nearly four years from the passing of the act, having completed part of the canal, and having marked out the tramroad, the landowners resisted the purchase, on the ground that the undertakers had deviated from the parliamentary line in the construction of the canal:—*Held*, that, as the deviation worked no injury to the objectors, and as the undertakers did not admit any intention to abandon the original line, and there remained ten years in which they might complete their works, this objection was untenable. *Lee v. Milner*, 2 Y. & C. 611; and see 2 M. & W. 824.

DIRECTOR.

See ACTION, 4, 5.
MANDAMUS, 5, 6.

DISTRESS.

See COSTS, 4, 7.
TOLLS, 12, 13.

DOCK—PORT.

See COMPENSATION, 2, 4, 5.
LIMITATION, 3.
MANDAMUS, 5, 6.
RATING, 2, 3, 4, 13, 28.

1. The stat. 39 Geo. 3, c. 69, s. 137, gives to the West India Dock Company certain rates and duties for all goods imported from the West Indies, which shall be landed, &c. from on board any ship entering into and using the docks, which rates are directed to be accepted for the use of the docks, and the quays, wharfs, and cranes, and other machines belonging thereto, and the land-waiter's fees on account of such goods after being unshipped, and all charges and expenses of wharfage, landing, housing, and weighing such goods, and of such cooperage as the same may want after being unshipped, and all rent for warehouse room for twelve weeks, "and all charges of delivering the same from the said warehouses." The latter words include a delivery of the goods into lighters in the dock, as well as an immediate delivery from the warehouses into land carriages placed under the cranes of the warehouses, although for the purpose of such delivery into lighters it be necessary to put the goods upon trucks in order to carry them across the quay, and afterwards crane them into the lighters. But it seems that, if the owner require any work to be done upon the goods ultra the mere transitus of them from the warehouse to the lighter, the Company are entitled to an extra compensation, to be settled by convention between the parties, as in other cases out of the act. *Harden v. Smith, Schroeder v. Same*, 8 East, 16.

2. The compensation clause in the London Dock Act, reciting that divers tenements, &c., may become less valuable by the trade being diverted therefrom, provides that in case they do so, or the owners or occupiers suffer loss by the dock works, the commissioners shall make them compensation; and no claim is to be made for compensation till three years after the opening of the docks, and then it is to be made within a given time:—

Held, that where the owner of an inheritance of a tenement, which was in lease, died after the three years from the opening of the docks without having made any claim, her devisee, and not her executor, was entitled to claim, within the time allowed, compensation for an injury done by the dock works to the inheritance in the time of his testatrix. *Rees v. London Dock Company*, 12 East, 477.

3. The London Dock Company are liable for the negligence of their servants in unloading goods, although the Company derive no profit from their labour. *Gibson v. Inglis*, 4 Camp. 72.

4. An act for keeping in repair a harbour imposed certain duties in a schedule annexed on goods exported and imported. In the schedule, under the head "metals," certain specified duties were imposed on copper, brass, pewter, and tin, and on all other metals not enumerated, for every £10 value, 10*d.*:—*Held*, that the latter words did not include gold and silver; and, therefore, that the commissioners were not entitled to demand for specie or bullion 10*d.* for every £10 value. *Casher v. Holmes*, 2 B. & Ad. 592.

5. The port of Kingston-upon-Hull is mentioned in acts of Parliament, charters, and other documents in two senses; first, according to the popular understanding, as denoting a particular place; and, secondly, in a larger acceptation, as comprising under one name a district of many places classed together for the purposes of the revenue, and of which Kingston-upon-Hull is the chief. The stat. 14 Geo. 3, c. 56, s. 42, which gives the Hull Dock Company a tonnage on ships coming into or going out of the harbour of Kingston-upon-Hull, and the Company's basin or docks, within the said port of Kingston-upon-Hull, or unloading or lading any of their cargo within the said port,

must be construed as using the term "port" in the popular sense, and not, therefore, as extending the burden of dock duties to places, which, in point of local description, are without the port of Hull, as Goole, on the river Ouse. *Kingston-upon-Hull Dock Company v. Browne*, 2 B. & Ad. 48.

6. Under a clause in an act of Parliament (14 Geo. 3), exempting ships "from the payment of the same port or toll duties more than once for the same voyage out and home, notwithstanding such ship or vessel might go out and return with a loading of goods or merchandize:"—*Held*, that a vessel, having cleared out of port at Hull, with a cargo of goods for Mogadore, on the coast of Africa, which she discharged and there took in another cargo for London, discharged the same at London, and took in a cargo for Hull, with which she arrived there, constituted two distinct voyages, and did not fall within the exemption. *Kingston-upon-Hull Dock Company v. Huntington*, 2 Chit. 689.

7. By stat. 14 Geo. 3, c. 56, s. 42, the following tonnage duties were imposed on every ship or vessel (except those in the king's service) coming into or going out of the harbour, basin, or docks of the port of Kingston-upon-Hull, or loading or unloading there. 1st, For every ship coming to or going between the said port and any port to the northward of Yarmouth or southward of Holy Island, 2*d.* per ton; 2nd, For every ship coming to or going between the said port and any port or place between the North Foreland and Shetland, on the east side of England, except as above, 3*d.*; 3rd, For every ship trading between the said port and any other port or place in Great Britain not before described, 6*d.* The duties to be paid on the ship's entry inwards, or clearance, or discharge outwards; or, if there were no entry, then to be paid at the custom-house at any time before the ves-

sel proceeded:—*Held*, that the first clause related only to ports on the east side of England between the places there named; that it extended to the port of Goole, though situate twenty-five miles inland from Hull, on the river Ouse; and, therefore, that vessels taking all, or part of their cargoes at Goole, and going to Hull, or vice versa, were liable to the duty of 2*d.*; and this, though they did not enter or clear at the custom-house:—*Held*, also, that the first clause did not apply to vessels loading at Leeds or other places, not ports, situated above Hull, and going directly thither; that the third clause (if those places were contemplated by it) did not refer to them with the precision necessary for imposing a duty; and (*Parks, J., dubitante*) that the vessels so loading at Leeds did not become liable to duty by merely passing through the entrance basin of the Goole Docks, without taking in goods or making any stay there. *Same v. Priestly*, 4 B. & Ad. 178.

8. A Dock Company having a swing bridge on a public highway, are bound, in the passing of vessels, to use all reasonable means (both as to the number of men employed and number of ships passed at a time) to prevent unnecessary delay; and, if they do not do all which can be expected of reasonable men, and if any one is obstructed in consequence, such obstruction will make them liable in damages for the injury sustained. *Wiggins v. Boddington*, 3 C. & P. 544.

9. Keeping up a capstan and rope in a cove to assist boats in landing, and without which they could not safely land in bad weather, is a good consideration for a reasonable toll on all boats frequenting the cove, whether they used the capstan or not; and the custom to exact the toll is good, although the party claiming it is neither owner of the cove nor lord of the manor, nor were his predecessors

shewn to have been such; but he and they had always been owners of the spot where the capstan stood, and of an estate in the neighbourhood. *Fal-mouth v. George*, 5 Bing. 286; 2 M. & P. 457.

10. By the acts of Parliament passed for building, improving, and maintaining the Liverpool Docks, the corporation (who are trustees for the purpose of carrying them into execution) are authorized to levy certain rates and duties on the ships and vessels entering and going out of the port of Liverpool; and they are empowered to borrow money, not exceeding £600,000, for the maintenance of the docks, by sale (by auction) of assignments of the rates and duties so imposed on the shipping, securing to the purchasers £100 each, with interest till paid:—*Held*, that such assignments were not a mere chattel, but a charge upon the docks, and, therefore, an interest in land. *Rex v. Winstanley*, 8 Price, 180.

11. A port may be created in modern times, with a right to receive a port duty from all who come within its limits.

A port duty *ex vi termini* imports a consideration for it. *Jenkins v. Harvey*, 5 Tyr. 326; 1 Gale, 23.

DOCUMENTS (*Production of*).

A case laid before counsel was accepted in an order for the production of documents. The Court considering itself bound, on the authority of *Bolton v. City of London*, 1 My. & K. 88, but expressing dissent at the decision in that case. *Nias v. North Eastern Railway Company*, 2 Keen, 76, affirmed 3 My. & Cr. 355.

DOWER.

The shares in the navigation of the river Avon, under the stat. 10 Anne, are real estate, and subject to dower. *Buckeridge v. Ingram*, 2 Ves. jun. 652. See also *Hovoe v. Chapman*, 4 Ves. 542.

DUES.

See DOCK.

DUTY (*Ad valorem*).

See COMPENSATION, 18.

EASEMENT.

See COMPENSATION, 5, 22.

RATING, 33.

1. Trespass for breaking and entering, on the 1st January, 1830, and on divers other days and times, &c., one close, called the railroad, and one other close formerly used as a railroad, &c. Pleas, (amongst others), that A., B., and C. were owners of the closes on each side of the *locus in quo*, which was a railway made by the plaintiffs under the authority of an act of Parliament; that the adjoining closes contained minerals, and that, according to the custom of the country, the minerals could only be conveniently conveyed by means of a railroad across the *locus in quo*. The plea then justified the trespasses for that purpose, and for the convenient and necessary occupation of the adjoining closes. Replication, protesting the soil and freehold, *de injuriâ absque residuo causæ*. Another plea alleged that the occupiers of the adjoining closes had, for twenty years, as of right, and without interruption, used and been accustomed to use the privilege and easement of passing and repassing &c., and laying down railroads across the plaintiffs' railroad. Replication to this plea, traversing the claim of right. New assignment of other and different purposes, to which there was judgment by default. The particulars complained of trespasses committed by the defendants in April and May, 1830, in a close, "which now is or heretofore was a rail or tram-road," and destroying the plates of the same, and laying down others. The evidence was, that the defendants, in February, 1829, took up some of the plates of the plaintiffs'

railway and altered the course of part of it, carrying it over their own land, and made a transverse railroad, which crossed the site of the old railroad, and also the new railroad:—*Held*, that the particulars were sufficient. Upon the issue, with regard to the more convenient occupation of the adjoining closes, there was much evidence on both sides; the plaintiffs gave evidence to shew, that, in constructing the transverse railroad, the defendants had an ulterior object in view. The Judge left it to the jury to say whether the transverse railroad was constructed *bond fide* for the more convenient occupation of the closes, or for some other object:—*Held*, that this direction was right.

Upon the issue, with regard to the twenty years' enjoyment of the easement:—*Held*, that the defendants were bound to shew an uninterrupted enjoyment, as of right, during that period; and that the plaintiffs might prove, under that issue, applications by the defendants, during the twenty years, for leave to cross their railroad, and that it was not necessary for them to reply such license specially under 2 & 3 Will. 4, c. 71, s. 8. *Monmouthshire Canal Company v. Harford*, 1 C., M. & R. 614.

2. A parol license from A. to B. to enjoy an easement over A.'s land, is countermandable at any time whilst it remains executory; and if A. conveys the land to another, the license is determined at once, without notice to B. of the transfer, and B. is liable in trespass, if he afterwards enters upon the land. *Wallis v. Harrison*, 4 M. & W. 538.

EJECTMENT.

See COMPENSATION, 10.

1. Service of a declaration in ejectment, on the book-keeper of a Company, in possession of part of the premises—*Held* sufficient. *Doe v. Roe*, 1 Dowl. 23.

2. Where houses have been pulled down by a Railway Company, and a railway constructed on the site of them:—*Held*, that this was such an occupation as amounted to an actual ouster of a tenant in common of the premises. *Doe d. Wason v. Horn*, 5 M. & W. 564.

EMBANKMENT.

See BANK.

ENGINES.

See BANKRUPT, 6.
NUISANCE, 9.

ESTATE.

See BANKRUPT.

DOWER.

EXECUTORS, 1, 4.

ESTOPPEL.

See PROPRIETORS, 6.

The laches of obligees in a bond (conditioned for the principal obligor to account for and pay over from time to time all such tolls as he should collect from the obligees), in not properly examining his accounts for eight or nine years, and not calling upon the principal for payment, so soon as they might have done, of sums in arrear or unaccounted for, is not an estoppel at law in an action against the sureties. *Trent Navigation Company v. Harley*, 10 East, 34.

EVIDENCE.

See BANKRUPT, 7.

COMPENSATION, 7.

NAVIGATION, 10, 15.

TOLLS, 2.

(*Equity*).

1. A witness stated that he believed, from a reference to his books of account, and from inspection of a cheque and other documents, which were produced to him at the time of his examination, that A., on a certain day, paid £500 to B.:—*Held*, that this was not sufficient evidence of payment. *Cator v. The Croydon Canal Company*, 4 Y. & C. 405.

2. Parol proof to control the terms of a written agreement refused to be admitted. *Johnston v. The Edinburgh and Glasgow Union Canal Company*, 1 Shaw & Macl. 117.

(*Law*).

3. In an action brought to charge A. as a partner to a trading Company, a witness, who, by other evidence than his own, appeared to be a shareholder in the Company, was held to be competent to prove that A. was a partner. *Hall v. Curzon*, 9 B. & C. 646; 4 M. & R. 565.

4. Where the plaintiff, having declared upon articles of agreement, calls upon the defendant to produce them; and they do not contain the contract stated in the declaration, he cannot afterwards object to the authority under which they were executed; nor can he be let in to give parol evidence under a general count of any contract arising out of those articles. *Scrimshaw v. Grantham Canal Company*, Forest, 67.

5. By the Cheltenham and Great Western Union Railway Act, (6 Will. 4, c. 77), it is enacted, that an action for calls on shares in that Company shall be *prima facie* evidence that a party is proprietor of shares. It appeared that a call was made in October, 1836, and that the book of shares, which contained the name of the defendant as a shareholder, was made up before the end of September, 1836, from claims sent in by different parties; but that the seal was not affixed to it till November, 1836:—*Held*, that this book was no evidence that the defendant was a proprietor of shares at the time of the call in October, 1836. *The Cheltenham and Great Western Union Railway Company v. Price*, 9 C. & P. 55.

6. In an action brought by A. and B. for diverting water from their works, it appeared that A., when in the sole possession of the same works, had brought a former action for a similar

injury, against the same defendants, in which he had recovered a verdict and judgment against them; and, it being proved that A. and B. were now in possession of the same works—*Held*, that this was abundant *prima facie* evidence that the present plaintiffs were privy in estate to the former plaintiff; and that the verdict and judgment in the former action were admissible in evidence against the same defendants in this action:—*Held*, also, that the circumstance of B.'s having been examined as a witness in a former action, when he was disinterested, did not render such verdict and judgment inadmissible. *Blakemore v. The Glamorganshire Canal Company*, 2 C., M. & R. 133.

EXECUTORS AND ADMINISTRATORS.

See DOCK, 2.

LIMITATION, 5.

MANDAMUS, 13.

PROPRIETORS, 3.

(*Equity*).

1. Testator subscribed for twenty shares of £100 each in a projected railroad, and paid £5 on each share, and covenanted to pay the remainder when called on. He bequeathed his personal estate to his widow, and devised certain of his real estates to a trustee, in trust to sell and pay all debts due from him on mortgage, or for the purchase of estates which he had contracted for, and all other just debts that should be due from him at his death. When he died, the shares were at a premium, and no further instalment on them had been called for. Two years afterwards, the act for making the railroad passed:—*Held*, that, the testator's personal estate being exonerated from his debts, his widow was entitled to have the unpaid instalments paid out of the real estates. *Blount v. Hipkins*, 7 Sim. 51.

2. When a canal is situated in the

provinces of Canterbury and York, but the office for transacting the business of the canal is in the former province, it is sufficient if the will of a shareholder be proved in the Prerogative Court of Canterbury. *Smith v. Stafford*, 2 Wils. 166.

(*Law*).

3. The administrator of a subscriber to a projected canal, deceased before the act passes for making it, cannot be sued as a subscriber to the undertaking, or as a proprietor of shares. And where the act indemnified executors and administrators against their cestui que trusts, if they should pay calls upon the shares of deceased persons out of their effects, and enabled the Company, if the executors had no assets, or refused to pay, to transfer the shares to others who would repay to the administrators the calls paid on the shares, and pay the future calls; and if no person would take them, then to declare the shares forfeited to the Company. *Semble*, that no action can be maintained against an administrator, though he has paid one call, for not paying subsequent calls. *Weald of Kent Canal Company v. Robinson*, 5 Taunt. 801.

4. An act for making a navigable canal, provided that the shares were to be deemed personal estate, and to be transmissible as such. The canal passed through parishes in the diocese of Worcester, and other parishes in the diocese of Lichfield and Coventry; the transfers of shares in the canal were filed at the public office of the company in the diocese of Lichfield and Coventry, where the dividends were also paid, and books of account kept:—*Held*, that, for the purposes of probate, the right of a shareholder to a share of the profits, being personal property, might be considered as locally situate in the diocese of Lichfield and Coventry, and that a probate granted by the

consistorial court of the bishop of that diocese was sufficient. *Ex parte Horne*, 7 B. & C. 632; 1 M. & R. 529.

EXEMPTION.

See RATING, 12, 16, 18, 26, 39.

EXPENSES.

See COSTS.

FISHERY.

See NAVIGATION, 13, 14.

A party holding a right of salmon fishing, found, in a question with an adjacent heritor, to have no right to erect sights and towing-paths on the alveus of the stream. But the House of Lords remitted to the Court of Session, to inquire whether a bulwark or embankment built by the adjacent heritor against the stream, was so constructed as to be injurious to the right of fishing in the water, and in a manner not necessary to its utility as a bulwark or embankment. *Forbes v. Smyth*, 1 Wils. & Sh. 583.

FIXTURES.

See COMPENSATION, 13.

FORFEITURE.

No relief against forfeiture under a bye-law of an incorporated Company for water-works, providing that the members shall receive notice of default in paying a call, and incur the forfeiture of non-payment ten days after the notice sent, though the lapse arise from ignorance of the call from accidental circumstances, and absence from town when the notice was sent. *Sparks v. Liverpool Water-works Company*, 13 Ves. 428.

GOODWILL.

See COMPENSATION, 13.

HIGHWAY.

See NUISANCE.

IMPROVEMENTS.

See CONSTRUCTION OF STATUTES.
NAVIGATION.

RATING, 17, 26, 27, 41, 45, 46.

INDEMNITY.

The commissioners under a navigation act, having decreed an indemnity according to a clause not applicable to the particular injury complained of, the order was reversed. *Rex v. Douglas River Undertakers*, 2 Ld. Ken. 499.

INDICTMENT.

See ACTION, 16, 18.

COMPENSATION, 5.

CORPORATION, 3.

MANDAMUS, 3.

NUISANCE.

INJUNCTION.

See CORPORATION, 2.

COVENANT, 1.

TOLLS, 1.

1. An injunction allowed to be moved for *ex parte*, in a pressing case, after the defendants had entered an appearance. In this case, counsel having been instructed to oppose the motion, although no notice had been given, the Court allowed them to be heard. *Acraman v. Bristol Dock Company*, 1 Russ. & M. 321.

2. On an interlocutory application for an injunction, the Court will only act prospectively, and with a view to keep matters *in statu quo*, and will not, unless in a very special case, grant the order in such a form as indirectly to compel some positive act to be done by the party enjoined. Effect of laches in depriving a party of his remedy by injunction. *Blake-more v. Glamorganshire Canal Navigation*, 1 My. & K. 154.

3. An injunction to restrain the pulling down of houses, granted on an *ex parte* motion, although the defendants had appeared. *Petley v. Eastern Counties Railway Company*, 8 Sim. 483.

4. An injunction to restrain the Grand Junction Water-works Company from applying to Parliament for

an act authorizing the Company to procure its supply of water from the river Colne instead of the Thames, as authorized by the existing acts under which it was incorporated, was refused. *Ware v. Grand Junction Water-works Company*, 2 Russ. & M. 470.

5. There is no equity to restrain by injunction the owners of a railroad made over the plaintiff's land, from using the railroad after it had been completed, or from interrupting the plaintiff's workmen in removing it, and restoring the land to its original state, although the possession of the land for the purpose of constructing the railway may have been obtained from a tenant of the plaintiff by circumvention and fraud. *Deere v. Guest*, 1 My. & Cr. 516.

6. Injunction against draining preparatory to opening a coal mine with prejudice to a canal, before establishing the right at law, refused upon laches for two years permitting expenditure. *Birmingham Canal Company v. Lloyd*, 18 Ves. 515.

7. A Railway Company, in exercise of the powers conferred on them by an act of Parliament, which gave compensation to persons whose property might sustain damage from their operations, were proceeding to erect an arch above a mill-race, for the purpose of sustaining an embankment on which the railway was to be constructed; and it appeared that injury would be done to the mill if the arch were of the proposed dimensions, but that the injury would be avoided if the arch were of certain larger dimensions, an injunction was granted to restrain the Company from making over the mill-race an arch of less than certain specified dimensions. *Coates v. Clarence Railway Company*, 1 Russ. & M. 181.

8. The owner of land upon which a Railway Company, empowered by act of Parliament, are about to enter,

is not entitled to an interlocutory injunction to restrain them from so doing, if by his silence and conduct he has permitted the Company to carry on their works, upon the supposition that they were entitled to enter on and take the land in question. *Greenhalgh v. Manchester and Birmingham Railway Company*, 3 My. & Cr. 784.

9. On the filing of an information by the Attorney-General, at the relation of an individual, and a bill by the relator, the Lord Chancellor granted an injunction *ex parte*, on affidavits, to restrain a purpresture on the river Thames. And it appearing that there had been no previous writ of *ad quod damnum*, and that an indictment in the King's Bench was depending against the defendants for the same act, the Lord Chancellor refused to dissolve the injunction before the trial of the indictment; notwithstanding there were some affidavits on the part of the defendants, stating that the act complained of was beneficial to the navigation. And it was held to be immaterial to whom the soil belonged, it not being competent to the Crown or to a subject to use it for any purpose amounting to a nuisance. *Attorney-General v. Johnson*, 2 Wil. Ch. R. 87.

INQUISITION.

See COMPENSATION, 24, 25, 26, 27.

CORONER.

WATER, 3.

INSPECTION (OF BOOKS).

See MANDAMUS, 8, 11, 12.

INTERPLEADER.

See PRACTICE, 4.

INTEREST.

See ACTION, 19.

COVENANT, 3.

LIMITATION, 1.

RATING, 40.

INVESTMENT (*Interim*).

1. Where under a railway act the Company are liable to the expenses of "all purchases" to be made by virtue of the act. This will include the expenses of investing the money in the funds previously to its being laid out in lands, to be settled to the like uses as the land purchased by the Company. *Ex parte Bishop of Durham*, 3 Yo. & C. 690.

2. Where by a railway act it was enacted that the monies paid into Court by the Company, for lands purchased by them, should, by order made upon the petition of the party interested, be invested in the purchase of other lands, to be settled to the like uses, and in the meantime should, by an order similarly obtained, be invested in the funds; and it was further enacted, that the Court might order the expenses of such purchases, and the investment of the purchase-money in land, "or other disposition of the same," to be paid by the Company:—*Held*, that the Company were liable to pay the expense of the interim investment of the money in the funds. *Ex parte Onslow, re London and Birmingham Railway Act*, 1 Y. & C. 553.

3. By an act of Parliament the London Dock Company were empowered to purchase land for the purposes of the act, and in certain cases the purchase-mones were to be re-invested in the purchase of other lands, and the expenses of the re-investment were to be paid by the Dock Company. In a subsequent part of the same act, the Lords of the Treasury were empowered to purchase certain legal quays within a given time, but no express directions were given as to the re-investment of the purchase-mones, or as to the payment of the expenses. By a subsequent act, not relating to the Dock Company, the time given to the Lords of the Treasury for purchasing the legal quays was extended, and it was enacted, that all the powers, provisions,

regulations, directions, clauses, matters and things in the former act should extend to the subsequent act:—*Held*, that the clauses in the former act as to the re-investing of the purchase-mones, and the payment of the expenses of such re-investment, were applicable *mutatis mutandis* to the subsequent act. *Re Lords of the Treasury*, 1834, 7 Sim. 154; *Affid.* 1 My. & Cr. 676.

ISSUE AT LAW.

Though the Court will not restrain an action, by a party through whose estate a canal is cutting, for deviating from the line, because he has laid by and rested upon his legal rights, yet if he files a bill to restrain their deviating, and then moves to commit them, the Court will not do so without a trial by jury in a disputed case, and directing an issue at law. *Agar v. Regent's Canal Company*, Coop. 77.

JOINDER.

See NUISANCE, 7.

PLEADING, 1, 2, 3, 4.

JURISDICTION.

See ACTION, 6.

LACHES.

See ESTOPPEL.

INJUNCTION, 2, 6, 8.

ISSUE AT LAW.

LAND AND LANDOWNER.

See COMPENSATION.

CONSTRUCTION OF STATUTES.

COSTS, 1, 2, 4.

CROWN.

DOCK, 10.

INJUNCTION, 5, 8.

LIMITATION, 4.

MANDAMUS, 2.

MINES, 1.

NAVIGATION, 13.

PUBLIC, 1, 2, 3.

RATING.

TOWING PATHS, 1.

WORKS, 1.

LAND TAX.

See ANNUITY.
COSTS, 2.

LEASE.

1. Construction of covenant in a lease that if lessor shall be minded to set out any part of the premises for a street, or to sell any part to build upon, he may resume upon certain terms. If he resumed, having a *bond fide* intent to build, though that cannot be acted upon, there is no equity for tenant; secondly, the generality of the latter words are not restrained by the former to buildings of any particular species; therefore, a contract with a Canal Company for lands resumed was enforced, warehouses being within meaning of lease, and wharfs, at least as appurtenant and wanted for enjoyment of warehouses. *Gough v. Worcester and Birmingham Canal Company*, 6 Ves. 354. See *Russell v. Coggins*, 8 Ves. 34.

2. When a person interested in a long term of years in certain property, agreed by mistake to sell the fee-simple of the property to the Company:—*Held*, on the construction of the railway act, that the reversion was barred, and that the transaction was equivalent to selling the fee. *Semble*, that the provisions of the 9th sect. 3 & 4 Will. 4, c. 27, are applicable to the case, when rent is reserved and no rent paid, but not to a case where no rent is reserved. *Ex parte Jones*, 4 Y. & C. 466.

LICENCE.

See COVENANT, 2.
EASEMENT.

LIGHT.

See ACTION, 10, 14.

LIMITATION.

See COMPENSATION, 28.

(Equity).

1. A Canal Company conveyed under their common seal the canal works and rates to a mortgagee to hold, &c. until repayment of certain money borrowed and interest. There was no covenant to repay:—*Held*, under the modern statutes of limitations, that although the mortgagee could recover the principal within twenty years, yet his remedy for arrears of interest was limited to six years. The point in dispute was, whether a mortgagee was entitled to six years or twenty years' arrears of interest. The defendant, the mortgagor, was willing before suit to pay the principal and six years' interest, but made no tender. At the hearing, the mortgagor succeeded on the point of interest:—*Held*, that, as there had been no tender, the mortgagor must pay the costs. *Hodges v. Croydon Canal Company*, 3 Beav. 86.

(Law).

2. Where a Canal Company were empowered to supply the canal with water from all streams whatsoever within the distance of 2000 yards, except as thereafter mentioned, with a proviso that nothing should extend to authorize them to take water from certain specified streams, between 10th June and 10th September, except only that, if one of those streams should overflow, the same may be taken into the canal so long as such overflowing shall continue, and that all actions should be brought for any thing to be done in pursuance of the act, or in the execution of the powers and authorities before given, within six calendar months after the fact committed; or in case of a continuation of damages, within three calendar months after the committing such damages shall have ceased:—*Held*, that the taking and continuing to take the water by the Company from one of the specified streams during the prohibited times might, nevertheless, be so far

a thing done in execution of the powers and authorities given them by the act, as to entitle the Company to the protection of the act, as to the time of commencing the action against them. And therefore an award which found that they did take the water from two of the specified streams, &c. during the prohibited times, and when the other streams did not overflow, and, consequently, that it was not done in pursuance of the act, or in the execution of its powers and authorities, and therefore not within the protection of the act as to the time of commencing the action, was ill. *Gaby v. The Wilts and Berks Canal Company*, 3 M. & S. 580.

3. By an act of Parliament, a Company was established for making and maintaining certain docks and basins, and was authorized to appoint a dock-master, who was to have power to direct the mooring, unmooring, moving and removing of all vessels into, or being in the docks, and to have the control over the space of 100 yards of the entrances into the docks, so far as related to the transporting of vessels coming in or going out; and the Company was to be sued in the name of their treasurer; and if any action should be brought against any person for any thing done in pursuance of the act, such action should be commenced within six calendar months after the fact committed. An action having been brought against the treasurer for an injury done to a vessel (within 100 yards of the entrance of the docks) by reason of improper directions having been given by the dock-master in transporting her into the docks; it was *held*, that the giving of such directions was a thing done in pursuance of the act of Parliament, and that the action ought therefore to have been brought within six calendar months after such directions were given. *Smith v. Shaw*, 10 B. & C. 277.

4. By acts of Parliament enabling a Company to make and maintain a

canal navigation, and to take lands for that purpose, making satisfaction, it was provided, that the Company should not take any garden-ground without consent of the respective owners and occupiers, and that any action to be brought for any thing done in pursuance of those acts should be commenced within six calendar months next after the fact should have been committed; or if there should be a continuance of damages, then within six calendar months next after the committing of such damage should have ceased. The Company wishing to take garden-ground for the purpose of sloping the banks of the canal, told the occupier, a tenant, that they had obtained the consent of the owner's agents, without which the tenant would not have given them permission; but the statement was not true. They then paid him a sum which he demanded on account of a former transaction, after which they entered and sloped away the ground. The land, in consequence, was from thenceforth overflowed by the Thames at every high tide. For this damage the landlord sued the Company more than six calendar months after the ground was taken, and the tide first let in:—*Held*, that the injury was one for which an action should have been brought within six months from the taking away of the land; and that the defendants were within the protection of the limiting clause, inasmuch as the act complained of was really done for the purpose contemplated by the statute, though, in the prosecution of that purpose, the defendants had been guilty of a misrepresentation to bad faith towards the occupier. *Lord Oakley v. Kensington Canal Company*, 5 B. & Ad. 138; but see *Reg. v. The Eastern Counties Railway Company*, 2 Railway Cases, p. 750.

5. A Canal Company were empowered by statute to impose rates of

toll for carriage of goods on the canal, and to fix the places of payment, and in case of non-payment to seize the goods in respect of which such rates ought to have been paid, or any part thereof, and the boat laden therewith, and detain the same till payment of such rates, and also of all arrears of the said rates due from the owner of such boat. And if such goods were not redeemed within seven days, to sell the same, as in cases of distress for rent:—*Held*, that this clause did not empower the Company to distrain goods when no longer on the canal, or to sell the boats.

The act also directed, that all actions for any thing done in pursuance thereof, should be commenced within six months next after the fact committed, or in case of a continuation of damages, then within six months next after the doing such damage should have ceased. Collieries, machinery, barges, &c., had been mortgaged by C. to F., to secure the repayment of certain monies, with a proviso, that in case of default F. should stand possessed of all the mortgaged property, in trust to levy out of the same so much as should be due to him. F. died, and the plaintiff took out administration, after which the mortgagor, who had remained in possession, made default, but was not dispossessed, and afterwards made a demise of the property to another party, of which transaction the plaintiff was not proved to have had any knowledge. The mortgagor's lessee took possession, and put his name upon the barges. These, and a quantity of coal, the produce of the collieries, were afterwards seized by the Company for rates due from the mortgagor's lessee, and sold. The administrator commenced an action of trover against the Company for the goods, more than six months after the seizure, but within six months of the sale:—*Held*, that the suit was commenced in time, since the plaintiff, who was out of posses-

sion, had no cause of action till the goods were sold. *Seem*, that if the mortgagor's lessee had sued, whether in trespass or trover, his action must have been commenced within six months of the seizure:—*Held*, also, that the plaintiff, as administrator, had sufficient property in the coal raised from the mines after he took out administration, and in the barges marked with the name of the mortgagor's lessee, to maintain this action.

Before the seizure, the mortgagor's lessee became bankrupt:—*Held*, that the goods seized were not in his possession by the consent of the true owner, within 6 Geo. 4, c. 16, s. 72, for that the consent of the mortgagor, who was merely permitted by the true owner to retain possession, did not satisfy the terms of the statute. *Fraser v. Swansea Canal Company*, 1 A. & E. 354; 3 N. & M. 391.

6. In trover against the treasurer of the West India Dock Company, for sugars deposited in the Company's warehouses:—*Held*, that the treasurer was within the protection of the 185th section of the 39 Geo. 3, c. 69, and entitled to a verdict, the action not having been commenced against him within the time limited by that clause, notwithstanding his having delivered up the sugars to adverse claimants, under a bond of indemnity. *Sellick v. Smith*, 3 Bing, 603; 11 Moore, 459; 2 C. & P. 284.

LINES OF CANAL.

See RATING, 12, 18.

LOCK.

See RATING, 1, 14, 32, 33, 43.

MANDAMUS.

See COMPENSATION, 24.

1. Mandamus, to execute one part of a power granted by act of Parliament first, denied. *Rex v. The Birmingham Canal Navigation Company*, 2 Wm. Bl. 708.

2. The Court will not grant a manda-

mus to compel a Canal Company pursuant to the provisions of an act of Parliament to proceed to an assessment of the value of land taken by them for the purposes of their canal; and also of the recompense to be made for the damages thereby sustained, if the parties interested in the land do not make their application to the Court within a reasonable time after the land was taken by the Company, especially if the parties have another remedy by ejectment. *Rex v. The Stainforth and Keadby Canal Company*, 1 M. & S. 32.

3. It is no objection to the granting of a mandamus to do a particular act, that an indictment will also lie for the omission to do that act.

Where a railway was made under the authority of an act of Parliament, by which the proprietors were incorporated, and by which it was provided that the public should have the beneficial enjoyment of the same, the Company having afterwards taken up the railway:—*Held*, that a mandamus might issue to compel the Company to reinstate and lay down again the railway. *Rex v. Severn and Wye Railway Company*, 2 B. & A. 646; 2 M. & S. 80.

4. Mandamus lies to two arbitrators to appoint an umpire under a canal act. *Rex v. Goodrich*, 2 Smith, 388.

5. By act of Parliament, empowering certain persons to make a floating harbour at Bristol, it was enacted "that it should and might be lawful for the directors of the Bristol Dock Company, and they were thereby authorized and required to make a common sewer, in a certain direction therein specified, and also to alter and reconstruct all or any of the sewers of the said city at the mouths thereof, so and in such manner that the sewers might be discharged considerably under the surface of the water in the floating harbour; and also to make such other alterations and amendments in the sewers of the

said city as might or should be necessary, in consequence of the floating of the said harbour." The directors altered several of the sewers so as to discharge them considerably under the surface of the water in the floating harbour; but the sewage there discharged was so offensive as to be a nuisance to the neighbourhood:—*Held*, that under the latter part of the clause above set forth, the directors were authorized and required to make a new sewer, if necessary, to remove the nuisance.

A writ of mandamus commanded the directors "to make such alterations and amendments in the sewer as were necessary in consequence of the floating of the harbour:"—*Held*, that this was in proper form, and that it was neither requisite nor proper to call upon the Company to make any specific alteration; the mode of remedying the evil being left to their discretion by act of Parliament.

Return to a mandamus denying the matters of the writ with a *protestando* is ill. *Rex v. Bristol Dock Company*, 6 B. & C. 181; 9 D. & R. 309.

6. It is discretionary in the Court either to determine the validity of a return to a mandamus on motion, or to order the case to be set down in the Crown Paper for argument. The St. Katharine Dock Company were incorporated by act of Parliament, which directed that all actions against the Company should be prosecuted against the treasurer or director for the time being; but that the body or goods, lands, &c., of such treasurer or director should not, by reason of his being defendant in such action, be liable to execution. An action having been brought by T. C. against the treasurer as such, and another by the Company, in the name of the treasurer, against T. C., all matters in difference were referred to an arbitrator, who awarded that T. C. had cause of action against the defendant, as such treasurer, for a certain sum, and

directed that the treasurer should pay T. C. that sum on demand; and, as to the other suit, he awarded that the treasurer, as such, had no cause of action, and ordered him, as such treasurer, to pay T. C. the costs on demand:—*Held*, that a mandamus would lie to the treasurer and directors, commanding them to pay the sums awarded. *Rex v. St. Katharine Dock Company*, 4 B. & Ad. 360.

7. By an act establishing a Canal Company, it was provided, that certain landowners might call upon them by notice, as directed in the act, to execute certain works communicating with the Company's canal and railways; and that, if the Company should refuse for six months after such request, the applicants might themselves perform the works in the same manner as the Company might have done them. An application being made to the Company under this clause, they answered that they would do the work themselves; but they delayed proceeding, and, on remonstrance, gave as a reason that the proposed operation would interfere with the property of other parties, who were likely, if so disturbed, to bring an action. The Company offered, nevertheless, to proceed if indemnified. The applicants, in answer, stated that they considered the excuse insufficient, and did not understand how they could be expected to indemnify. Six months had at this time elapsed since the original application. The works not being done, a mandamus was applied for:—*Held*, that the writ could not issue, it not appearing from the above facts that, after the consent given by the Company to execute the works, there had been any express demand and refusal of performance, or any conduct on the Company's part equivalent to such refusal. *Rex v. Brecknock and Abergavenny Canal Company*, 3 A. & E. 217.

8. By statute, incorporating a Canal Company, the affairs of the Company

were to be managed by a committee, who were authorized to appoint a clerk for better carrying into execution the purposes of the act; the committee were required to enter in books an account of their disbursements, receipts, and transactions; and the books were to be open at all seasonable times to the inspection of the proprietors. A proprietor applied to the clerk for an inspection of the books, which were under his charge; the clerk said, he would refer the demand to the committee. The proprietor attended the committee and there repeated his request; and the chairman said they would take time to consider it: ten days afterwards the proprietor applied again to the clerk, who refused the inspection. On motion for a mandamus to the Company to allow inspection of the books:—*Held*, that there had been no sufficient refusal by the committee to warrant the application. *Semble*, that a party applying for a mandamus to give inspection of such documents, ought to shew that, when he demanded the inspection, he stated the object for which he wanted it. *Rex v. Wilts and Berks Canal Company*, 3 A. & E. 477.

9. A statute directed that a sum of money should be paid to certain commissioners, who were therewith to execute all such works, &c., as should from time to time be deemed necessary, proper, or expedient for putting certain banks and bridges in a permanent state of stability and security, and for constructing the forelands and slopes of the banks, as far as practicable, upon one uniform system. By mandamus, reciting this clause, and that the money had been paid to the commissioners, they were ordered to proceed to put the banks forthwith in a permanent state of stability and security, and to construct the forelands and slopes of the banks as far as practicable upon one uniform system.

Return, that the commissioners had

from time to time, at all times from the passing of the act hitherto, proceeded to execute all such works as should be or were from time to time deemed necessary, proper, or expedient for putting the banks in a permanent state of stability and security, and for constructing the forelands and slopes of the banks, as far as practicable, upon one uniform system:—*Held*, an insufficient return, and a peremptory mandamus awarded. *Rex v. Ouze Bank Commissioners*, 3 A. & E. 544.

10. By an inland navigation act, 35 Geo. 3, c. 106, it was enacted, that any person aggrieved by the works might complain to the commissioners of the navigation at one of their meetings, and they should hear such complaints and report upon them to a subsequent meeting, which should make such order and give such satisfaction as should be thought just and reasonable; with an appeal to quarter sessions by any party dissatisfied with any judgment of the commissioners.

A party aggrieved required satisfaction of the commissioners (October 9th), and had several communications with them, but received no definite answer. He then (January 18th) demanded, in the manner prescribed by the act, that the commissioners should, at their next meeting, hear and report upon his complaint, stating that he would, on that occasion, be prepared with evidence of the alleged injury; his agent attended the meeting (February 8th) with the witnesses, but they were ordered to withdraw; and no adjudication was made on his complaint, the previous question being moved and carried. No explanation was given to the complainant. The commissioners had, on his first application, laid a case before counsel, but had not been able to obtain the opinion by February 8th, for which reason they made no communication to the complainant, fearing that, if made, it might be treated as an ad-

judication. The opinion was obtained (March 24th) too late, as the commissioners alleged, for notice to be given to the complainant of a hearing at their next meeting (March 30th). After that meeting, and before the subsequent one, the complainant moved for a mandamus to the commissioners to hear and report upon his complaint:—*Held*, that the conduct of the commissioners was a virtual refusal to hear.—Rule absolute, with costs. *Reg. v. Thames and Isis Navigation*, 8 A. & E. 901.

11. By a canal act, it was provided, that the directors should keep books; and that the proprietors, landowners, and others interested in the navigation, should be at liberty to inspect the Company's books:—*Held*, that a bond creditor was entitled to such inspection to enable him to meet the defence intended to be set up by the Company in an action upon the bond. *Pontet v. The Basingstoke Canal Company*, 2 Scott, 543.

12. Where a canal act gives the control over the Company's affairs to a committee, and authorizes every proprietor to inspect the books in which the committee are directed to enter accounts, &c., a mandamus will not be granted to compel the Company to permit a proprietor to inspect the books, where there has been no refusal by the committee, although there has been a direct refusal by the clerk in whose possession the books are. *Rex v. Wiltshire Canal Company*, 5 N. & M. 344.

13. A mandamus will lie against a Company of proprietors of a canal navigation, and their clerk, to compel them to make an entry of the probate of a deceased proprietor, and to register the name and place of abode of his executrix, as the proprietor of one share in the profits of the navigation belonging to the deceased at the time of his death. *Rex v. Worcester Canal Company*, 1 M. & R. 529.

52 MASTER IN CHANCERY.

14. The Court refused a mandamus to a Railway Company to compel them to convey goods along their rail; no clause in their act of incorporation requiring them to carry all goods offered for conveyance, although they had agreed with certain persons to carry their goods to the exclusion of all others. A mandamus will not be granted to enforce the general law of the land, if an action will lie, although in some cases it will be granted, even where an indictment may be preferred. *Ex parte Robins*, 7 Dowl. 566.

15. A writ of mandamus directed to a corporation commanding them to pay a poor's-rate to the overseers, omitted to state that the defendants had no effects on which a distress could be levied:—*Held*, a fatal objection in substance to the writ, and might be taken after the return, or at any time before a peremptory mandamus issued; and it is doubtful whether a mandamus will lie in such a case. *Rex v. Margate Pier Company*, 3 B. & A. 220; 2 Chitty, 256.

MANDAMUS, Costs of.

See COMPENSATION, 24.
COSTS.

MASTER IN CHANCERY.

1. The right to process under an undertaking for a serjeant-at-arms, &c., immediately on exceptions to the report of an insufficient answer disallowed, is waived by plaintiff's taking out a subpoena for a better answer, and excepting to the report, entitling defendant to eight days after the exceptions are disposed of. *Agar v. Regent's Canal Company*, 19 Ves. 379; Coop. 221.

2. Upon a reference to the Master to inquire as to the title to compensation for damage done to lands, he ought regularly to inquire whether the damage was temporary or permanent. *Cator v. Croydon Canal Company*, 4 Y. & C. 405.

MINES.

MATERIALS.

See BANKRUPT, 6.

MILEAGE.

See RATING, 24, 35, 37, 46.
TOLLS.

MILL.

See INJUNCTION, 7.
RATING, 43, 46.

MINES.

See COMPENSATION, 19.
EASEMENT.
INJUNCTION, 6.

1. A canal act provided that the Canal Company should not be entitled, on purchasing lands for making a canal, to any coal mines, &c., under the same, but that such mines should belong to the same persons as would have been entitled to them, if the act had not been made: but it required the owners to give notice to the Company of their intention to work their mines, within ten yards of the canal, and that the Company might inspect the mines, and might stop the further working of them, paying compensation to the owners:—*Held*, that the right of the owners to work within the ten yards was left as before the act, if after notice given by them to the Company the latter did not purchase out their rights: and that, the canal being damaged by the nearer approach of the mine after such notice and non-purchase, no action lay against the coal owner for such injury, which happened by the default of the Company in not purchasing; *aliter* where the house of one claiming under a grant from the owner of the soil was undermined. *Wyrley and Essington Canal Navigation Company, v. Bradley*, 7 East, 368.

2. Where a canal was made under the 8 Geo. 3, c. 38, which did not give the proprietors power to appropriate the water raised by engines from

mines near the canal, and another canal was made under the 23 Geo. 3, c. 92, which gave to the proprietors power to appropriate the water raised by engines from mines within 1000 yards of the canal, provided the produce of such mines were carried along some part of the canal, and these two canals were incorporated by the 24 Geo. 3, c. 4, but it was provided, that the clauses in the two former acts should still be severally applicable to the canals made under those acts respectively:—*Held*, that the proprietors of the latter canal were not justified in taking the water raised from a mine within 1000 yards of it, unless substantially the whole produce of the mine was carried immediately from the mine along that canal, and that it did not suffice to shew that the whole produce was carried immediately from the mine along the canal made under the 8 Geo. 3, and that one-third was carried from that canal along the canal made under the 23 Geo. 3.

By the 58 Geo. 3, c. 19, reciting that it was expedient to extend one system of management to these canals, it was enacted, "That all the canals so made as aforesaid under the former acts should be considered as included and governed by all the clauses in the 23 & 24 Geo. 3, so far as the circumstances and nature of the case would admit, as if the same had been described in the 23 Geo. 3, as part of the works to be made and done under and by virtue of that act:"—*Held*, that this did not give a right to take water from mines, the produce whereof was carried along the canal made under the 8 Geo. 3, c. 38. *Finch v. Birmingham Canal Company*, 5 B. & C. 821; 8 D. & R. 680.

3. A canal act provided, that no owner of any mines should carry on any work for the getting of coal or minerals within twelve yards from the canal, or any reservoir to be made by the Company; nor should any coals or other minerals be got under any

part of the canal, or towing paths thereunto belonging, or any such reservoir, or under any land or ground within the distance of twelve yards of either side of the canal, or any reservoir, &c., except as thereafter mentioned, without the consent of the Company. By another clause it was provided, that when the owner of any coal mine, &c., lying under the canal, towing paths, reservoir, &c., or within the distance thereinbefore limited, should be desirous of working the same, then such owner should give notice of his intention to the Company, three months before he should begin to work such mines, in order to determine what coal or other minerals might be come at and gotten without prejudice to the canal, &c., and if the Company should neglect to inspect such mines within thirty days next after the receipt of such notice, then the owners of such mines were authorized to work such part of the said mines as lay under the canal, &c., or within the distance aforesaid; and if upon inspection the Company should refuse to permit the owners of the mines to work such parts of the mines lying as aforesaid, or any part thereof, as they might have come at and gotten, then the Company should, within three calendar months, pay to the owners the value thereof. By another clause, it was provided, that nothing in the act contained should defeat the right of any owner of lands or grounds in, upon, or through which the canal, &c. should be made, to the mines lying within or under the lands or grounds to be set out or made use of for such canal, but all such mines were reserved to such owners respectively; and that it should be lawful to such owners, subject to the conditions therein contained, to work all such mines, provided that in working such mines no injury be done to the said navigation:—*Held*, that this proviso was to be construed with some qualification, viz. either as importing that

the party working the mines was to do no unnecessary damage to the navigation, or no extraordinary damage by working the mines out of the usual mode; and, therefore, where notice had been given by the lessee of a coal mine of his intention to work the same under a reservoir belonging to the Canal Company, and the latter had not purchased his rights within the time limited by the act, that the lessee was entitled to work the mine under such reservoir in the usual and ordinary mode, and the reservoir having been damaged by reason of such working by the lessee, that no action was maintainable by the Company against him for such damage. *Dudley Canal Navigation Company v. Grazebrook*, 1 B. & Ad. 59.

4. By a local act, a Company are empowered to take lands, with an exception of mines, for a railway, paying the value of the lands, and making compensation for damages sustained by reason of the execution of the works, and for damage, loss, or inconvenience sustained by reason of the execution of any of the powers of the act, such value and compensation to be fixed by agreement, or assessed by a jury:—mines to be worked by the owner, so that no damage be thereby done to the railway, and in case of damage, the owner to repair it at his own expense, or the Company to repair in case of neglect or refusal, and recover the expenses from the owner, the owner of land taken by the Company, and for which compensation is paid, cannot, upon afterwards discovering that a mine to which he is entitled cannot be worked without doing damage to the railway, claim further compensation in respect of the loss sustained thereby. Compensation in respect of such contingent loss should have been claimed at the time of the original agreement or assessment. *Rex v. Leeds and Selby Railway Company*, 5 N. & M. 246; 3 A. & E. 683.

NAVIGATION.

MISREPRESENTATION.

See LIMITATION, 4.

MORTGAGE.

See LIMITATION, 1, 5.

RATING, 36, 40.

SHARES.

TOLLS.

NAVIGATION.

See COMPENSATION.

COVENANT, 2.

EXECUTORS, 3, 4.

NUISANCE, 3, 4.

RATING.

TOLLS.

WORKS.

1. The public are not entitled at common law to tow on the banks of ancient navigable rivers. *Ball v. Herbert*, 3 T. R. 253.

2. Navigation is not to be obstructed by throwing rubbish, or by unloading ballast in havens, roads, channels, &c., such unloading being an offence under 19 Geo. 2, c. 22. *Brucklesbank v. Smith*, 2 Burr. 656; 2 Ld. Ken. 358.

3. Where a vessel was sunk in a navigable river, by accident or misfortune, an indictment cannot be maintained against the owner for not removing it. *Rex v. Watts*, 2 Esp. 675.

4. A navigable river is a public highway, and all persons have a right to come there in ships, and to unload, moor, and stay there as long as they please; but if they abuse that right, so as to work a private injury, (as to interrupt the enjoyment of a private fishery), they are liable to an action. *Anon.*, 1 Camp. 517, n.

5. The owner of a vessel sunk in a navigable river is bound to place a buoy over the wreck, and it is not enough to station a watchman near the spot to point out the danger. *Harmond v. Pearson*, 1 Camp. 515.

6. Held, that an action would lie, by the owners of goods in a ship, against the owners, for a loss occasioned by the ship's striking against an anchor

lying under water in the river Trent without a buoy. *Trent and Mersey Navigation v. Wood*, Abb. Ship. 256; 3 Esp. 127; 4 Dougl. 287.

7. The placing a floating dock in a public river has been held to be a nuisance, though beneficial in repairing ships. *Anon.*, 1 Russ. C. & M. 340.

8. In a public navigable river, twenty years' possession of the water at a given level, &c. is not conclusive as to the right. *Vooght v. Winch*, 2 B. & A. 662.

9. Where a plaintiff declared that, before and at the time of committing the grievance, he was navigating his barges laden with goods along a public navigable creek, and that defendant wrongfully moored a barge across, and kept the same so moored, from thence hitherto, and thereby obstructed the public navigable creek, and prevented the plaintiff from navigating his barges so laden, *per quod* plaintiff was obliged to convey his goods a great distance over land, and was put to trouble and expense in the carriage of his goods over land:—*Held*, that this was such a special damage for which an action upon the case would lie. *Rose v. Miles*, 4 M. & S. 101.

10. The flux and reflux of the tide is *primâ facie* evidence of a navigable river; but not absolutely inconsistent with an exclusive right. A judgment in an action on the case, disaffirming an exclusive right to a river, is strong evidence in another action trying the same right, but not conclusive. *Miles v. Rose*, 1 Marsh. 313; 5 Taunt. 705.

11. A public right of navigation in a river or creek may be extinguished either by an act of Parliament, or writ of *ad quod damnum* and inquisition thereon, or under certain circumstances by commissioners of sewers, or by natural causes, such as the recess of the sea, or an accumulation of mud, &c.; and where a public road

obstructing a channel (once navigable) has existed for so long a time that the state of the channel at the time when the road was made cannot be proved; in favour of the existing state of things it must be presumed that the right of navigation was extinguished in one of the modes before mentioned, and the road cannot be removed as a nuisance to that navigation.

Every creek or river into which the tide flows is not on that account necessarily a public navigable channel, although sufficiently large for that purpose,—*per Bayley, J. Rex v. Montague*, 4 B. & C. 598; 6 D. & R. 616.

12. There is a custom on the Thames which authorizes barges to be moored at low water, for one tide, at the piles in front of the wharfs; but in places where there are no piles, the custom does not extend to mooring at the wharf, unless through distress. *Wyatt v. Thompson*, 1 Esp. 252.

13. The owner of a several fishery is, *primâ facie*, the owner of the soil. An act of Parliament authorizing persons to repair and cleanse a navigable river, does not authorize them to make a passage to a new wharf on the river. *Partheriche v. Mason*, 2 Chit. 658.

14. A weir appurtenant to a fishery, obstructing the whole or part of a navigable river, is legal, if granted by the Crown before the commencement of the reign of Edward the First. Such a grant may be inferred from evidence of its having existed before that time. If the weir, when so first granted, obstruct the navigation of only a part of the river, it does not become illegal by the stream changing its bed, so that the weir obstructs the only navigable passage remaining. Trespass for breaking down a weir appurtenant to a fishery. Justification, that the weir was wrongfully erected across part of a public and navigable river, (the Severn), where the king's subjects had a right to navigate,

and that the rest of the river was choked up, so that defendants could not navigate without breaking down the weir. Replication, that the part where the weir stood was distinct from the channel where the right of navigation existed, and was not a public navigable river. Rejoinder, that the part was a part of the Severn, and that the king's subjects had a right to navigate there when the rest was choked up, and that the rest was choked up. Surrejoinder, traversing the right:—*Held*, that in support of this traverse plaintiff might shew user to raise presumption of such a grant as above, and was not bound for the purpose of introducing such proof to set out his right more specifically on the record.

Where the Crown had no right to obstruct the whole passage of a navigable river, it had no right to erect a weir obstructing a part, except subject to the rights of the public, and therefore, in such a case, the weir would become illegal, upon the rest of the river being so choked that there could be no passage elsewhere.

A party objecting to the production of a copy, on account of due search not having been made for the original, must make the objection at the time of the trial, distinctly on that ground; if he does not, the Court will not afterwards entertain it. *Williams v. Wilcox*, 8 A. & E. 314.

15. A right of way claimed by the plaintiff, by reason of his possession of a close, from the said close unto and along a stream or watercourse into a navigable river, for himself and his servants to pass and repass in boats, &c., is not supported by evidence of an user of the way by the occupier of an inn and yard held as one entire subject, from which yard the plaintiff's close had recently been severed. *Quære*, whether such a claim, even by the occupier of the entire premises, would be sustained by proof, that goods were brought to the

NUISANCE.

inn along that watercourse in boats not belonging to the occupier, or navigated by his servants properly so called? *Bower v. Hill*, 2 Scott, 535.

NEGLIGENCE.

See CARRIER.

CORONER, 1.

DOCK, 5.

PLEADING, 5, 6.

NEWSPAPER (*Notice*).

See CONSTRUCTION OF STATUTES, 12.

NOTICE.

See ACTION, 8, 10.

AFFIDAVIT.

CARRIER, 4.

COMPENSATION, 3, 10, 11, 12, 26.

CONSTRUCTION OF STATUTES, 2, 12.

FORFEITURE.

INJUNCTION, 1.

MANDAMUS.

MINES, 1, 3.

NUISANCE, 1.

NUISANCE.

See ACQUIESCENCE, 1.

INDICTMENT.

INJUNCTION, 9.

MANDAMUS, 5.

VENUE.

WATER, 2.

(*Equity*).

1. To have a work erected at great expense, whether private or public, removed by this Court as a nuisance, the person complaining should have given notice not to proceed, otherwise the Court will leave complainant to law. *Jones v. Royal Canal Company*, 2 Moll. 319.

(*Law*).

2. Trespass brought by order of the Court of Chancery, to try whether a bank erected by the plaintiff was a

nuisance to the harbour of W., the jury found for the defendants, and accompanied the verdict with the following observations, which were indorsed on the postea: "The jury also find, that they all agree that the continuance of the bank is some injury to the harbour, but are not all agreed to its being a material injury: that it did not appear to the jury that any legal proceedings were had within the space of twenty years from the time of the erection of the banks:"—*Held*, that this finding was no ground for setting aside the verdict, either as shewing that the nuisance was immaterial, or that the possession of the bank by the plaintiff for twenty years was a bar. *Folkes v. Chadd*, 3 Dougl. 340.

3. Upon a trial of an indictment for a nuisance in a navigable river, by erecting staiths there for loading ships with coals, the jury were directed by the learned Judge to acquit the defendants, if they thought that the abridgment of the right of passage occasioned by these erections was for a public purpose, and produced a public benefit; and if the erections were in a reasonable situation, and a reasonable space was left for the passage of vessels on the river; and he pointed out to the jury, that by means of the staiths coals were supplied at a cheaper rate, and in better condition, than they otherwise could be, which was a public benefit:—*Held*, by *Bayley* and *Holroyd, Js.*, that this direction to the jury was proper, (*Lord Tenterden, C. J., diss.*) *Rex v. Russell*, 6 B. & C. 566.

4. On the trial of an indictment for a nuisance in a navigable river, and common king's highway, called the harbour of C., by erecting an embankment in the water-way, a finding by the jury that the embankment was a nuisance, but that the inconvenience was counterbalanced by the public benefit arising from the alteration, amounts to a verdict of guilty. It is

no defence to such an indictment that, although the work be in some degree a hindrance to navigation, it is advantageous in a greater degree to other uses of the port. *Rex v. Ward*, 4 A. & E. 384; 6 N. & M. 38.

5. Where a high constable presents persons for a nuisance in a highway, he must go before the grand jury, and give his evidence on oath. *Rex v. Bridgwater and Taunton Canal Company*, 7 B. & C. 514.

6. Defendant being proprietor of a colliery, made a railroad from it to a seaport town; the railroad was 400 yards long, and was laid upon a turnpike road, which it narrowed so far that in some places there was not a clear space for two carriages to pass. Defendant allowed the public to use his railroad, paying a toll:—*Held*, that the facility thereby given to the general traffic with the seaport, and particularly to the conveyance of coals, &c. thither, was not such a convenience as justified the obstruction of the highway.

By an act, 45 Geo. 3, c. lxxiv, authority was given to all persons to lay waggon ways along or across any of the roads mentioned in the act, (of which the turnpike road in question was one), but the parties so doing were to keep such roads in repair for twenty yards on each side of the waggon way so laid down:—*Held*, that the act did not authorize the laying of such waggon way where there were not twenty yards of road on each side.

The above act was temporary, and was repealed before its expiration. *Quere*, if the waggon way, supposing it otherwise legal, would have continued so, after the repeal or expiration of the act?

By statute 44 Geo. 3, c. lv, a Company was incorporated and empowered to make a railway through certain districts. By sect. 5, they were directed to form new roads in lieu of any existing ones, that might be injured by their railway. Sect. 70 empowered

proprietors of lands, mines, &c. to make railways through their own lands, and those of other persons consenting, and across and along any road or roads, to communicate with the principal railway; and no reference was made to any former limitation of powers:—*Held*, nevertheless, that the power in this clause was not absolutely given, but must be subject to the provision of the sect. 5, or to the condition of leaving space enough, independent of the railways, for the public to pass. *Rex v. Morris*, 1 B. & Ad. 441.

7. On indictment for nuisance to a public canal navigation, established by act of Parliament, it appeared that the canal was carried across a river and the adjoining valley, by means of an aqueduct and an embankment, in which were several arches and culverts: that a brook fell into the river above its point of intersection with the canal; and that in times of flood the water, which was there penned back into the brook, overflowed its banks, and was carried, by the natural level of the country, to the above-mentioned arches, and through them to the river, doing, however, much mischief to the lands over which it passed: that except for the nuisance after mentioned, the aqueduct would be sufficiently wide for the passage of the river at all times but those of high flood, notwithstanding the improved drainage of the country, which had increased the body of water: that the defendants, occupiers of land adjoining the river and brook, had for the protection of their lands, subsequently to the making of the canal, aqueduct, and embankment, erected, or heightened, certain artificial banks, called fenders, on their respective properties, so as to prevent the flood water from escaping as above mentioned; and that the water had consequently, in time of flood, come down in so large a body against the aqueduct and canal banks as to endan-

ger them and obstruct the navigation: that the fenders were not unnecessarily high, and that if they were reduced, many hundred acres of land would again be exposed to inundation:—*Held*, that the defendants were not justified under these circumstances in altering, for their own benefit, the course in which the flood water had been accustomed to run; that there was no difference in this respect between flood water and an ordinary stream; that an action on the case would have lain at the suit of an individual for such diversion, and, consequently, that an indictment well lay where the act affected the public.

The jury found that the acts creating the nuisance were done by the defendants severally:—*Held*, nevertheless, that as the nuisance was the result of all those acts jointly, the defendants were rightly joined in one indictment, which stated the acts to have been several. *Rex v. Trafford*, 1 B. & Ad. 874.

8. In trespass against surveyors of the highways for pulling down a watch-house, the act 13 Geo. 3, c. 78, s. 82, does not enable them, under a plea of not guilty, to justify the removing it, as being a nuisance on the highway. *Witham Navigation v. Padley*, 4 B. & Ad. 69.

9. By an act reciting that a railway between certain points would be of great public utility, and would materially assist the agricultural interest and the general traffic of the country, power was given to a Company to make such railway, according to a plan deposited with the clerk of the peace, from which they were not to deviate more than 100 yards. By a subsequent act the Company, or persons authorized by them, were empowered to use locomotive engines upon the railway. The railway was made parallel and adjacent to an ancient highway, and in some places came within five yards of it. It did not appear whether or not the line could have been made, in

those instances, to pass at a greater distance. The locomotive engines on the railway frightened the horses of persons using the highway as a carriage road. On indictment against the Company for a nuisance:—*Held*, that this interference with the rights of the public must be taken to have been contemplated and sanctioned by the legislature, since the words of the statute authorizing the use of the engines were unqualified; and the public benefit derived from the railway (whether it would have excused the alleged nuisance, at common law, or not) shewed at least, that there was nothing unreasonable in a clause of an act of Parliament, giving such unqualified authority. *Rex v. Pease*, 4 B. & Ad. 30; 1 N. & M. 690.

10. Where a public Company has the right by law of taking up the pavement of the street for the purpose of laying down pipes, the workmen they employ are bound to use such care and caution in doing the work as will protect the king's subjects, themselves using reasonable care, from injury; and if they so lay the stones as to give such an appearance of security as would induce a careful person, using reasonable caution, to tread upon them as safe, when, in fact, they are not so, the Company will be answerable in damages for any injury such person may sustain in consequence. *Drew v. New River Company*, 6 C. & P. 754.

11. Indictment for a nuisance, by erecting and continuing piles and planking a harbour, and thereby obstructing it, and rendering it insecure. Special verdict, that, by the defendant's works, the harbour is in some extreme cases rendered less secure:—*Held*, that the defendant was not responsible criminally for consequences so slight, uncertain, and rare, and that a verdict of not guilty must be entered. *Rex v. Tindall and others*, 6 A. & E. 143.

PLEADING.

OBSTRUCTION.

See NUISANCE.
TOLLS, 11.

OUSTER.

See EJECTMENT, 2.

PARISH.

See RATING, 1, 5, 8, 11, 19, 22, 23, 35, 37, 38.

PARTICULARS.

See EASEMENT, 1.

PARTNER.

See ACTION.
EVIDENCE, 3.

PARTY.

See ACTION.
PLEADING.

PARTY WALL.

See COMPENSATION, 14, 15, 16.

PERSONALTY.

See EXECUTORS.
SHARPS.

PLEADING.

See CARRIER, 5.
DEMURRER.
EASEMENT.
INJUNCTION.
NAVIGATION, 14.
RATING, 20.
WATERCOURSE, 3.
WORKS, 6.

(*Equity*).

1. The legal title to purchase-money or compensation-money to be ascertained by the award of a commissioner, under an Inclosure Act, is not complete until the award is made; therefore, if a person entitled to such money assigns away his interest before the award is made, he is not a necessary party to a bill filed by the assignee for the recovery of the money. *Cator v. Croydon Canal Co.*, 4 Y. & C. 405.

2. General rule, requiring all persons interested to be parties, dispensed with, where it is impracticable or extremely difficult in such a case to obtain a decree. To establish right of suit to a mill, for instance, the Court only requires parties sufficient to secure a fair contest; and right being established in that way, consequential relief may be had against the rest in another suit. *Adair v. New River Company*, 11 Ves. 429.

3. Some of the shareholders having been made co-plaintiffs in the bill without their privity or consent, on their application an order was made, with costs, that their names should be struck out as plaintiffs. *Keppell v. Bailey*, 2 My. & K. 518.

4. Chief clerk to a Company, though he has no interest, and may be examined as a witness, may nevertheless be made a party in a suit against such Company for discovery. *Gibbons v. Waterloo Bridge Company*, 5 Price, 491.

(Law).

5. Case for the negligent management of a train of railway carriages, whereby it ran against another train, in one of which the plaintiff was riding, and injured him. Plea, that the parties having the management of the train in which the plaintiff was, managed it so negligently and improperly that, in part by their negligence, as well as in part by the defendant's negligence, the defendant's train ran against the other, and caused the injuries to the plaintiff:—*Held*, that the plea was bad in form, as amounting to not guilty; and, in substance, for not shewing, not only that the parties under whose management the plaintiff was were guilty of negligence, but also that, by ordinary care, they could have avoided the consequences of the defendant's negligence. *Bridge v. Grand Junction Railway Co.*, 3 M. & W. 244.

6. In an action for running against the plaintiff's carriage, a plea that the

damage was the result of the negligence of both parties, is bad in substance as well as form, for it amounts to the general issue. *Armitage v. Grand Junction Railway Co.*, 6 Dowl. 340.

7. Where a Judge's order has been obtained to plead several pleas, and that order is made a rule of Court, if the plaintiff wishes to get rid of those pleas, his motion should be to rescind the Judge's order. A rule to strike out the pleas was discharged, because not drawn up "on reading the declaration, or on affidavit that the pleas were identical." The Court will not allow an amendment in such cases. *The South Eastern Railway Company v. Sprott*, 8 Dowl. 493; 3 P. & D. 110.

POOR-RATE.

See RATING.

PORT.

See DOCK.

PRACTICE.

See MANDAMUS.

1. Upon exceptions taken to an answer for insufficiency, the Master may look to the materiality of them, and overrule immaterial exceptions. *Agar v. Regent's Canal Co.*, Coop. 221.

2. The right to process under an undertaking for a serjeant-at-arms, &c., immediately on exceptions to the report of an insufficient answer disallowed, waived by plaintiffs taking out a subpoena for a better answer, and excepting to the report, entitling defendant to eight days after the exceptions are disposed of. *Id.*, 19 Ves. 379; Coop. 221.

3. An injunction to restrain the pulling down of houses granted on an ex parte motion, although the defendants had appeared. *Petley v. Eastern Counties Railway Co.*, 8 Sim. 483.

4. In interpleading suits it is necessary for the defendants to enter into evidence as against each other. *The*

Thames and Medway Canal Company v. Nash, 5 Sim. 280.

5. Defendant in contempt, and some exceptions to his answers allowed and some overruled. If plaintiff excepts to the Master's report as to the exceptions overruled, and defendant to those which the Master had allowed, defendant is entitled to a subpoena for a better answer upon the specialties of the case. *Id.*, Coop. 221; see Gen. Ord. viii, 3rd April, 1828.

PRESCRIPTION.

See EASEMENT, 1.
NAVIGATION, 8.

PRESENTMENT.

See NUISANCE.

PRINCIPAL AND SURETY.

See ESTOPPEL.

A contractor undertook to perform certain works, and it was agreed that three-fourths of the work, as finished, should be paid for every two months, and the remaining one-fourth on the completion of the work:—*Held*, that the sureties for the due performance of the contract were released from their liability by reason of payments exceeding three-fourths of the work done having, without the consent of the sureties, been made to the contractor, before the completion of the work. *Calvert v. London Dock Company*, 2 Keen, 638.

PROBATE.

See EXECUTORS, 2, 4.
MANDAMUS, 13.

PROCESS.

See PRACTICE, 2.

PROFITS.

See RATING, 4, 25, 30, 31, 44.

PROPRIETORS AND SUBSCRIBERS.

See ACTION.

BANKRUPT.

CONSTRUCTION OF STATUTES.

COSTS, 7.

EVIDENCE, 3, 5.

EXECUTORS.

MANDAMUS, 12, 13.

PUBLIC COMPANY.

1. By a navigation act it was enacted that, on a certain day, the first general meeting of the proprietors should be held, at which the Company should execute deeds under their common seal for each distinct share, "which deeds should respectively vest a certain share in each proprietor," the plaintiff declared in assumpsit against the defendant, for not completing a contract for the purchase of some shares, that on a day prior to the first general meeting "he was lawfully entitled to so many shares:"—*Held*, that this was a material averment, and the ground of a nonsuit, as it could not be proved, though there was another clause in the act by which certain persons by name (of whom the plaintiff was one) were made a corporation for the purposes of the act, and the money to be subscribed was to be divided into so many equal shares, "which were thereby vested in the persons so subscribing, &c." *Latham v. Barber*, 6 T. R. 67.

2. By a navigation act the shares were declared to be vested in the subscribers, their executors, and assigns, with power to the subscribers to assign their shares; and a committee, to be appointed under the act, were authorized to make calls on the proprietors of shares, at such times as they should think fit:—*Held*, that an original subscriber is not liable for any call made by the committee after assigning his share.

The same act empowered the Company to sue for calls, &c. "by action

of debt or on the case:"—*Held*, that an action on the case in tort lay. *Huddersfield Canal Company v. Buckley*, 7 T. R. 36.

3. The administrator of a subscriber to a projected canal, deceased before the act passes for making it, cannot be sued as a subscriber to the undertaking, or proprietor of shares; and where the act indemnified executors and administrators against their cestui que trusts, if they should pay calls upon the shares of deceased persons out of their effects, and enabled the Company, if the executors had not assets, or refused to pay, to transfer the shares to others who would repay to the administrators the calls paid on the shares, and pay the future calls; and if no persons would take them, then to declare the shares forfeited to the Company. *Seemle*, that no action can be maintained against an administrator, though he has paid one call, for not paying subsequent calls. *Weald of Kent Canal Company v. Robinson*, 5 Taunt. 801.

4. A Company were empowered by act of Parliament to carry on certain works, and the committee were authorized to make calls for money upon the proprietors not exceeding £10 per share, from time to time, as they should find necessary, so that no calls should be made at the interval of less than two months from each other. None of the powers of the act were to be put in force till £33,500 were subscribed. The committee began the works before that sum was subscribed, and made a single order, calling on the proprietors for several payments of £10 each, to be made at intervals of two months. A subsequent act recited, that the capital of £33,500 had not been subscribed; that the Company had proceeded in the works, incurred debts, &c., and that a certain sum was due from defaulters in the payment of calls. It provided for carrying on the works, and for

making further calls; and it enacted, that the powers, &c., of the former act, (except where expressly altered), should remain vested in the Company, though the £33,500 had not been subscribed.

In an action by the Company against one of the committee, for money due on some of the calls, made as above-mentioned, others of which he had paid:—*Held*, that the calls being made all at one time were irregular; that they were not ratified by the mention of them in the second statute, as it could not be presumed in the absence of any expression to such effect, that the legislature, when passing that act, was apprised of their having been improperly made; and that the defendant was not estopped by having joined in making the calls, or by his payment of part of them from disputing their validity; for that, the calls being against the law, no person ought to have been misled into a compliance with them, by the defendant's conduct or admissions. *The Stratford and Moreton Railway Company v. Stratton*, 2 B. & Ad. 518.

5. The statute establishing a particular Company provided that the whole of the said sum of £100,000 shall be subscribed before any of the powers and provisions given by the act shall be put in force. The Company made a call on the shares before the subscriptions were complete, and commenced an action for the call after they were so:—*Held*, that such action was not maintainable; the completion of the subscription list being necessary to enable the Company to make the call, as well as to bring the action. *The Norwich and Lowestoffe Navigation Company v. Theobald*, 1 M. & M. 151.

6. An act of Parliament, 6 Geo. 4, c. xxx, to enable a Company to form a railway, prescribed the form of action against the proprietors for calls, and enacted that it should only be necessary to prove that the defendant was

a proprietor, and that the calls had been made in pursuance of the act; it also recited that a sum of money had been subscribed by the proprietors under a contract binding their heirs, whereas, in fact, that sum had not been subscribed by the proprietors:—*Held*, that a defendant who, with the knowledge of the misrecital, had paid previous calls, and acted as a proprietor, was estopped from questioning the validity of the act upon the ground of misrecital, and that it was not incumbent upon the plaintiff to shew that the defendant had executed a contract under seal, in order to prove that he was a proprietor within the meaning of the act. *Cromford and Highpeak Railway Company v. Lacey*, 3 Y. & J. 80.

PROXY.

See TOLLS, 8.

PUBLIC.

See ACCOUNTS, 3.

ACQUIESCENCE, 1, 2.

ACTION, 16, 18.

NUISANCE.

SHARES, 3.

TOLLS, 3.

1. Where private property is by the consent of the owner invested with a public interest or privilege for the benefit of the public, the owner can no longer deal with it as private property only, but must hold it subject to the rights of the public in the exercise of that public interest or privilege conferred for their benefit. *Allnutt v. Inglis*, 12 East, 527.

2. *Held*, (varying the judgment of the Court of Session), that a heritor was not entitled to erect a bulwark or any other open manufacture on the banks of the river Tay, which might have the effect of diverting the stream of the river, in times of flood, from its accustomed course, and throwing the same upon the lands of an opposite

proprietor, although it was alleged that the bulwark was intended to protect the heritor's lands from the flood. *Menzies v. Breadalbane*, 3 Wil. & Sh. 235.

3. Defendant, being proprietor of a colliery, made a railroad from it to a sea-port town. The railroad was 400 yards long, and was laid upon a turnpike road, which it narrowed so far, that in some places there was not a clear space for two carriages to pass. Defendant allowed the public to use his railroad, paying a toll:—*Held*, that the facility thereby given to the general traffic with the seaport, and particularly to the conveyance of coals, &c. thither, was not such a convenience as justified the obstruction of the highway.

By an act, (45 Geo. 3, c. lxxiv), authority was given to all persons to lay waggon-ways along or across any of the roads mentioned in the act, (of which the turnpike road in question was one), but the parties so doing were to keep such roads in repair for twenty yards on each side of the waggon-way so laid down:—*Held*, that the act did not authorize the laying of such waggon-way, where there were not twenty yards of road on each side.

The above act was temporary, and was repealed before its expiration. *Quere*, if the waggon-way, supposing it otherwise legal, would have continued so after the repeal or expiration of the act.

By stat. 44 Geo. 3, c. lv, a Company was incorporated and empowered to make a railway through certain districts. By sect. 5, they were directed to form new roads in lieu of any existing ones that might be injured by their railway. Sect. 70 empowered proprietors of lands, mines, &c. to make railways through their own lands, and those of other persons consenting, and across and along any road or roads, to communicate with the principal railway; and no reference was made to any former limitation of

powers:—*Held*, nevertheless, that the power in this clause was not absolutely given, but must be subject to the provision of sect. 5, or to the condition of leaving space enough, independent of the railways, for the public to pass. *Rex v. Morris*, 1 B. & Ad. 441.

4. By a private statute, reciting that a proposed railway between S. and W. P. and its branches would be of great public utility, a Company was incorporated for the making of such railway in a line parallel to and in some places within five yards of a highway, from which line no deviation was to be made exceeding 100 yards. A subsequent act authorized the use of locomotive engines on the railway; upon an indictment for using the engines, whereby horses were frightened, and accidents occasioned on the highway, the alleged nuisance was found by verdict, but it was also found that the engines were of the best construction, and used with due care, and that by reason of these engines the public obtained better and cheaper coals:—*Held*, that such a restriction of the rights of the public was not unreasonable, and must be presumed to have been contemplated by the legislature when authorizing the use of locomotive engines without words of qualification. *Rex v. Pease*, 1 N. & M. 690; 4 B. & Ad. 30.

5. An Embankment Company was by an act of Parliament (not limited in duration) empowered to make a road, and to erect turnpikes upon or across “any lanes or ways leading, or that might thereafter lead out of the same;” and to take tolls at such turnpikes. By subsequent acts, another Company was empowered to make a railway; and it was enacted, that all persons should have free liberty to use the same, with carriages properly constructed, upon payment only of such rates and tolls as should be demanded by the Railway Company, not exceeding the sums mentioned by that

act. The railway was afterwards made, and it crossed the Embankment Company’s road:—*Held*, first, that the railway, though made and opened to the public by act of Parliament, was a “way” within the meaning of the first-mentioned act. Secondly, that the clause in favour of the public in the railway act, did not take away the vested right of the Embankment Company to their tolls; and, consequently, that they might take toll of persons crossing their road upon the railway. *Rowe v. Shilson*, 4 B. & Ad. 726; 1 N. & M. 734.

PUBLIC COMPANY.

See ACTION.

BANKRUPT, 4. CORPORATION.

1. A number of persons associating together, and subscribing sums of money for the purpose of obtaining a bill in Parliament, to make a railway, are partners in the undertaking; and therefore, a subscriber, who acted as their surveyor, cannot maintain an action for work done by him in that character, on account of the partnership, against all or any one of the other subscribers. *Holmes v. Higgins*, 1 B. & C. 74; 2 D. & R. 196.

2. One of several persons who have subscribed an agreement, *inter se*, to promote a joint undertaking, or common purpose, cannot withdraw his name, and discharge himself from the engagement, without the consent of the rest of the subscribers. And if an act of Parliament have been passed, for effectuating the purpose of the undertaking, by which certain obligations are created, such original subscriber is not exonerated from the liabilities imposed by the act, by having, during the progress of the bill, renounced, before the committee, all further connexion with the undertaking, and desired that his name might be, in consequence, omitted in the act; nor can

the circumstance of his name so being omitted, have the effect of disengaging him. *Kidwelly Canal Company v. Reby*, 2 Price, 93.

3. A Company formed for the purpose of making a railway, one of the regulations of which was, that 15,000 shares of £50 each should be raised, and then, that application should be made to Parliament, and which, after continuing for rather more than a year, was dissolved, because no eligible line of road could be found, is not an illegal Company, under the act 6 Geo. 1, c. 18, so as that a party, who has bought shares, may, on that account, recover back the money paid for them; but if the party who has sold shares, has not complied with a regulation of the Company, stating, that all transfers to be valid must be approved by a committee; so that the transfer to him was not a legal transfer, a person who has purchased of him may recover the money paid, on the ground that the consideration has failed, although he did not tender back the scrip receipts he received. *Kempson v. Saunders*, 2 C. & P. 366.

4. Where, in a private act of Parliament, it is provided, that no action shall be commenced "against any person" for any act done in pursuance or by the authority of the statute, unless 20 days' previous notice in writing shall have been given to the intended defendant:—*Held*, that this provision would apply to the Company for whose benefit the act was passed, as well as to a single individual. *Boyd v. The London and Croydon Railway Company*, 6 Dowl. 721.

PURCHASE-MONEY.

See AGREEMENT, 5.

COMPENSATION.

CONSTRUCTION OF STATUTES, 2,
3, 7, 8.

COSTS, 1, 2, 3.

INVESTMENT.

VENDOR.

1. Where an act of Parliament establishing a Railway Company, directs that the money to be paid for lands to be purchased by the Company shall be paid into the bank, until the same shall, upon petition, be applied in the purchase of other lands; and, in the meantime, until such purchase can be made, shall, upon application to the Court, be invested in the funds; and that the expenses and costs attending such purchase shall be paid by the Company:—*Held*, that, under the latter clause, a party applying to have the money invested in the funds is not entitled to the costs of the application. *Ex parte Taylor*, 1 Y. & C. 229.

2. *Semble*, that where money is paid into Court under the usual provisions in a railway act, for payment into Court of the purchase-money for lands held by disputed titles, the respective interests of the parties claiming title to the money so paid into Court may be adjusted on a petition presented in the matter of the act. *Ex parte Isaacchaud*, 3 Y. & C. 721.

3. Where money is in Court under a railway act, previous to being laid out in lands to be settled "to the like uses," the Court will lend its aid to an advantageous purchase beyond the amount of the money in Court, and will direct the extra costs to be paid out of the money in Court. *Ex parte Newton*, 4 Y. & C. 518.

4. A small sum of money in Court, under a railway act, to be laid out in lands to be settled "to the like uses," ordered to be applied in new erections. *Ex parte Shaw*, 4 Y. & C. 506.

PURPRESTURE.

See INJUNCTION, 9.

RATING.

1. The grantee of the right of navigation of a river is rateable to the poor

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in respect of tolls arising from a sluice erected in the parish, though he himself resides elsewhere, and the tolls are collected in another parish. *Rex v. Cardington*, Cowp. 581.

2. Lands purchased by a Company, and converted into a dock, according to an act of Parliament, which declares that the shares of the proprietors shall be considered as personal property, are rateable to the poor in proportion to the annual profits. *Rex v. Hull Dock Company*, 1 T. R. 219.

3. The Hull Dock Company were held rateable in respect of the tonnage duties received by virtue of the stat. 14 Geo. 3, c. 56, although it appeared that the expenditure in repairs, during the period for which the rate was made, exceeded the amount of the duties received. *Rex v. Hull Dock Company*, 5 M. & S. 394.

4. A rate upon the Hull Dock Company to the full amount of their profits, without regard to the amount of poor-rates with which they are chargeable, is bad. *Rex v. Hull Dock Company*, 5 D. & R. 359; 3 B. & C. 516.

5. Where a navigation runs from A. to B., through several intervening parishes, and the tolls for the whole navigation are collected in those two parishes, they may be assessed to the poor-rates in those two parishes for the whole amount, according to the proportion collected in each.

The justices of the sessions are the proper judges of the equality of poor-rates; and the Court of B. R. will not interfere upon their being unequal, unless the inequality be manifestly apparent on the rate. *Rex v. The Undertakers of the Aire and Calder Navigation*, 2 T. R. 660.

6. Houses built on land embanked from the Thames, in pursuance of the 7 Geo. 3, c. 37, are not liable to be assessed to rates made under the 11 Geo. 3, c. 29. *Eddington v. Borman*, 4 T. R. 4.

7. A barge way and toll-gate in the

hamlet of Hampton-Wick, purchased by the city of London, by virtue of the 17 Geo. 3, c. 18 (an act passed for more effectually completing the navigation of the Thames, and empowering the city to levy tolls and duties towards the charges of the navigation), are rateable towards the relief of the poor in that hamlet for such part of the tolls as becomes due there, notwithstanding the tolls are collected in another parish. *Rex v. The Mayor, &c., of London*, 4 T. R. 21.

8. Where, by a navigation act, the proprietor was entitled to a toll of 4s. per ton for goods carried from A. to B., or from B. to A., and to a proportionable sum for any less distance; and was also enabled to appoint any place of collection: it was held, that the tolls for goods, carried the whole voyage from A. to B., are rateable in B., though in fact they are collected in a parish between A. and B.; because the tolls become due where the voyage is completed. *Rex v. Page*, 4 T. R. 543.

9. By an act of Parliament, the commissioners of a navigation were authorized to take certain tolls, the whole of which were directed to be applied to public purposes:—*Held*, that the tolls were not rateable to the poor. *Rex v. The Commissioners of Salter's Load Sluice*, 4 T. R. 730.

10. A. having granted to B. a lease for years of way-leaves (for the purpose of carrying coals), and the liberty of erecting bridges, and levelling hills over certain lands, B. made the waggon-ways, inclosed them, thereby excluding all other persons, erected bridges, and built two houses on the land for his servants:—*Held*, that B. was liable to be rated to the poor for "the ground called the waggon-way." *Rex v. Bell*, 7 T. R. 598.

11. A navigation act empowered the proprietors to take so much per mile per ton for all goods carried along the canal:—*Held*, that they were

rateable to the poor for the tolls in the different parishes where the tolls became due; that is, where the respective voyages finished; though for their own convenience they were authorized to collect the tolls where they pleased, and did, in fact, collect them in other parishes. *Rex v. Staffordshire and Worcestershire Canal Navigation Company*, 8 T. R. 340.

12. Where goods are carried along two different lines of canal, one of which is by the statute exempted from being rated in respect of the tolls, and the other not, though the voyage happen to finish on the unexempted line where the tolls became due and are received; yet the Canal Company shall not be rated for more than such proportion of the tolls as accrued in respect of the carriage along the unexempted line. And the toll, arising in respect of so much per ton per mile, is to be rated only for so many miles as the goods were carried along the unexempted line, and where the act directs that the tolls should be exempt from any taxes, rates, &c., other than such as the land, which should be used for the purpose of the navigation, would have been subject to if the act had not been made, that goes to exempt the tolls, *quod* tolls, altogether from being rated in respect of the line so exempted, leaving the land rateable as before. *Rex v. Leeds and Liverpool Canal Company*, 5 East, 325.

13. By the construction of the stat. 39 & 40 Geo. 3, c. 47, the London Dock Company were liable, even during the first twelve years of their establishment, to be rated for the fair annual value of their warehouses and other works which were finished and productive, though all the works directed by the act were not completed; but such completed works must, under such circumstances, be rated for their value at the rate of $8\frac{1}{2}d.$ in the pound; such being the rate calculated upon by the legislature to raise 139*l.* 8*s.* 7*d.*

per quarter upon £3966, the average rental for ten years preceding the act of Parliament, on the premises destroyed by the Company in making their works: and which quarterly sum the Company were, at all events, bound to pay to the parish during the twelve years, or until the works were completed, whether those works were productive or not. But when productive beyond that sum, the surplus is to be taken in the first instance by the Company, in order to reimburse themselves what they may have advanced to the parish, to make good the deficiencies before any such productive surplus existed, until the Company shall be reimbursed; therefore, until these purposes are effected, a rate made on the increased real value of the dock premises at more than $8\frac{1}{2}d.$ in the pound, or a rate of $8\frac{1}{2}d.$ in the pound on the old average value of the premises before the erection of the Company's works, and below the increased value of the new works, is in either case bad. *Rex v. St. George, Middlesex*, 9 East, 127.

14. An act of Parliament having empowered the Duke of Bridgewater to erect a lock upon the Rochdale Canal, and to receive at such lock certain rates or tolls upon goods in vessels navigated from that canal into his own, as a compensation for the profits arising to him from certain wharfs at Manchester, which were sacrificed for the public benefit:—*Held*, that a poor's-rate on his trustees, occupiers of the Rochdale canal, lock, tunnel, dues, or rates, (which dues or rates are only other names for the lock rated therewith), is good, though the trustees were found not to be inhabitants of the township for which the rate was made. Though the sessions find that certain persons in the township were possessed of visible stock in trade there, and were personally liable to be rated in respect thereof, if by law such property were liable to

be rated; yet if they also state that they were not satisfied, from the evidence offered before them, that there was any surplus profit on such stock, by which they could amend a rate which omitted them, that concludes the question. *Rex v. Sir A. Macdonald (Duke of Bridgewater's Trustee)*, 12 East, 324.

15. Land, of which the annual value is improved by a spring rising within it, may be rated to the poor at such improved value, although the owners of the land, who are also occupiers, do not receive any of the profits derived from the spring, nor does any part become due in the parish where the land lies. *Rex v. New River Company*, 1 M. & S. 503.

16. Canal lands exempted by acts of Parliament from rate in respect of the value of the lands increased by the tolls. Tolls *per se* not rateable to the poor's-rate. *Rex v. St. Mary, Leicester*, 6 M. & S. 400.

17. A canal act directed that the Company should be rated for all lands and buildings in the same proportion as other lands and buildings lying near the same, and as the same would be rateable, if they were the property of individuals in their natural capacity; and a subsequent act directed that all rates and assessments upon personal estate of the Company should be assessed in every parish in proportion to the length of the canal in such parish:—*Held*, that the Company were liable to be rated for their lands, &c., only at the same value as other adjacent lands, and not according to the improved value derived from the land being used for the purposes of the canal. *Rex v. Grand Junction Canal Company*, 1 B. & A. 289.

18. Where a canal was made under the 8 Geo. 3, which contained no clause as to the mode of charging it to the parochial rates, and another canal was made under the 23 Geo. 3, c. 92, and was therein directed to be rated in a

special manner; and these two canals were incorporated by the 24 Geo. 3, by which it was provided, that all the clauses, powers, provisions, restrictions, exemptions, &c., contained in each of the two former acts should still remain distinct from each other; and afterwards, by 58 Geo. 3, c. 19, reciting that it was expedient to extend one system of management to the whole canal, it was enacted, "that all the canals, &c., so made as aforesaid under the former acts, or any of them, should be deemed part, parcel, and member of the Birmingham Canal Navigations, and be considered as included and governed by all the clauses, &c., in the 23 & 24 Geo. 3, (save and except so much thereof as related to exemptions from stamp duties, or the quantum of tolls to be collected), as if the same had been described in the 23 Geo. 3, as part of the works to be made and done under and by virtue of that act." It was held, that this provision only incorporated these canals, &c., for the purpose of management; and that it did not authorize the canal originally made under the 8 Geo. 3 to be rated to the parochial taxes in the special manner pointed out by the 23 Geo. 3. *Rex v. Birmingham Canal Navigation Company*, 2 B. & A. 570.

19. Where a river navigation extended through several parishes, and certain tonnage dues became payable in respect of goods carried along the line of navigation, and landed at a wharf locally situate within the parish of B.:—*Held*, that a rate on the proprietor of those dues for their own amount in the parish of B., stated to be for river tonnage, could not be considered as a rate upon that part of the river locally situate within the parish of B., but as a rate upon the parts of the river situate as well within as without the parish; and that it could not, therefore, be supported:—*Held*, also, that the 41 Geo. 3, c. 23, s. 1,

does not give the Court of King's Bench the power of amending a poor rate. *Res v. Milton*, 3 B. & A. 112.

20. A writ of mandamus directed to a corporation commanding them to pay a poor's-rate to the overseers, omitted to state that the defendants had no effects on which a distress could be levied:—*Held*, a fatal objection in substance to the writ, and might be taken after the return, or at any time before a peremptory mandamus issued; and it is doubtful whether a mandamus will lie in such a case. *Res v. Margate Pier Company*, 3 B. & A. 220; 2 Ch. 256.

21. The proprietors of an inland navigation were rated to the relief of the poor for a certain number of acres of land within the townships occupied by their canal, and were assessed in respect of that land at a sum not exceeding that which they actually received for the passage of goods over that part of the canal situate within the townships:—*Held*, that this rate was good. *Res v. Trent and Mersey Navigation Company*, 1 B. & C. 545; 2 D. & R. 752.

22. The proprietors of an inland navigation are rateable to the relief of the poor in every parish through which the navigation passes, as occupiers of the land situate in each parish, used for the purpose of the navigation; and, therefore, where the proprietors of such a navigation, which extended through different parishes, were rated in one for the entire amount of their tolls, the Court held that the rate could not be supported. *Res v. Palmer*, 1 B. & C. 546; 2 D. & R. 793.

23. The proprietors of a navigation, extending through several parishes, are to be rated in an intermediate parish, not in respect of the riverage becoming due in that parish for goods landed there, but in respect of the profits of the land used for the navigation situate within the parish. *Res v. The*

Earl of Portmore, 1 B. & C. 551; 2 D. & R. 798.

24. By a canal act, the proprietors of the Oxford Canal were empowered to take a certain sum per ton per mile upon all goods. By a subsequent act for making a new canal, reciting, that it was apprehended that the making of the intended canal would be injurious to the proprietors of the Oxford Canal, and that it had been agreed that an indemnification should be made to them, as a compensation for such injury, it was enacted, "that, instead of the mileage duty payable to the proprietors of the Oxford Canal, it should be lawful for them to take, for all coals which should pass from the Oxford Canal into and upon the said intended canal, so much per ton, without any regard to the distance the same should pass along the Oxford Canal; and for all other goods which should pass from any other navigable canal into and upon the Oxford Canal, and from thence into and upon the said intended canal, or from the intended canal into and upon the Oxford Canal, and from thence into and upon any other navigable canal, a certain other sum per ton, without regard to the distance the same should pass from the said Oxford Canal:—*Held*, first, that the proprietors of the Oxford Canal were rateable to the poor in respect of their mileage duty in every parish, through which the canal passed. Secondly, that they were liable also to be rated in every parish, along which the canal passed, for a proportion of the compensation duty. *Res v. Oxford Canal Navigation Company*, 4 B. & C. 76; 6 D. & R. 86.

25. By the stats. 16 Geo. 3, c. 66; 25 Geo. 3, c. 87, and 30 Geo. 3, c. 60, the Dudley Canal Company was incorporated, but none of these acts contained any clause respecting the mode in which the Company should be assessed to parish or other taxes. By the 33 Geo. 3, c. 121, the old pro-

prietors, and certain new ones, were re-incorporated, for certain purposes, with the same powers as were given by the previous acts, to which reference was made; and this act, for the first time, empowered the Company to make collateral cuts. By sect. 34, it was enacted, that the said Company of Proprietors should from time to time be rated to all parliamentary and parochial taxes and assessments, for or in respect of the land and grounds taken and used by the said Company, and all warehouses and other buildings erected, or to be erected by the said Company of Proprietors, as other lands, grounds, and buildings lying near to the said canal and collateral cuts were or should be rated:—*Held*, that this clause was not to be construed retrospectively, so as to divest the parish of K. of the right of assessing the canal to the relief of the poor, by including in the rateable valuation the profits derived from the Company's tonnage dues. *Rex v. The Dudley Canal Navigation Company*, 7 D. & R. 466.

26. By a canal act of the 31 Geo. 3, c. 31, s. 77, it was enacted, that the Company should be rated to all parochial taxes in respect of their lands, &c., in the same proportion as other lands lying near the same should be rated, and as the same lands would be rateable in case the same were the property of individuals, in their natural capacity. By a subsequent act of the 38 Geo. 3, c. 31, s. 20, it was enacted that the Company should be rated to all parochial taxes, in respect of the lands used by them for the purposes of the said navigation, in the same proportion as other lands and buildings adjoining or lying near the canal should be rated; but it was further enacted, that it should be lawful for the Company to agree with any owner of lands adjoining their lands, taken for the purpose of the said navigation, for an exemption from all

rates and taxes in respect of such lands, and for charging the same upon the adjoining lands of such persons, and in all such cases the parochial taxes, rates, &c., which might be thereafter charged upon or payable in respect of the lands so taken for the purposes of the said navigation, should be rated and charged upon such adjoining lands, and upon the owners and occupiers thereof, and the lands of the Company should be exempted and discharged therefrom:—*Held*, first, that by the 31 Geo. 3, c. 31, s. 77, the Company were not liable to be rated for the land used for the purposes of the canal, according to its improved value:—*Held*, secondly, that the 77th section of the 31 Geo. 3 was not repealed by the 20th section of the 38 Geo. 3, and that the Company were not liable to be rated for the improved value of the land. *Rex v. The Inhabitants of St. Peter the Great*, 5 B. & C. 473; 8 D. & R. 331.

27. By a canal act it was provided, that lands, whether covered with water or not, and also all dwelling-houses, wharfs, &c. belonging to the Company, should be rateable to the maintenance of the poor in the several parishes where they were respectively situated; the lands according to their quantity and quality, and the dwelling-houses, wharfs, &c. according to the nature and respective uses thereof, and should be assessed in like manner as lands of a like quality, and dwelling-houses, wharfs, &c. of a like and similar size or nature, in the respective parishes where the same should be situate, should be assessed, and that the rates, duties, and other personal property of the Company liable to be rated to the poor, should be assessed in like manner, and in the same proportion, as other personal property should be assessed:—*Held*, that land of the Company used by them for the purpose of the canal, was rateable *quod*

land, not in respect of its improved value, but in respect of that which would have been its value, if it had not been used for the purposes of the canal.

The Company had on the margin of a large basin a piece of land adjoining the private yard of a timber-merchant. This piece of land next the basin consisted of natural ground; it was not faced with brick or timber, and the ground below the water gradually sloped down to the bottom of the basin. The timber-merchant landed his timber upon this piece of land, and it was there marked and measured by revenue officers. No acknowledgment or rent was paid to the Company for this privilege of landing the goods there, but their rates and duties were increased, a greater number of ships entering the basin in consequence of this privilege:—*Held*, that this piece of land was not a wharf within the meaning of the act of Parliament, and was not liable to be rated as such to the relief of the poor. *Rex v. The Regent's Canal Company*, 6 B. & C. 720; 9 D. & R. 760.

28. The trustees of Liverpool Docks are not rateable in respect of the dock dues, nor of the premises purchased or hired for the use of the docks, as they have no beneficial occupation, but are merely servants of the public, being directed by act of Parliament to apply the whole of the rates, first to paying off the debt incurred in making the docks, and then to lower the rates, reserving sufficient to keep the docks in repair. *Rex v. The Inhabitants of Liverpool*, 7 B. & C. 61; 9 D. & R. 780.

29. Where the surplus tolls of a navigation were directed by act of Parliament to be expended in repairing public bridges and highways:—*Held*, that they were not rateable to the relief of the poor. *Rex v. Weaver Trustees*, 7 B. & C. 70; 9 D. & R. 788.

30. A Canal Company is rateable to

the relief of the poor in every parish through which the canal passes in proportion to the profits which the land occupied by them in such parish yields, and, therefore, where a canal passed through several parishes in which the tonnage dues payable varied, it was held, that the Company were rateable to the relief of the poor of each parish for the amount of tonnage dues actually earned there, and not for a part of the whole amount earned along the whole line of the canal, in proportion to the length of the canal in that parish. *Rex v. The Inhabitants of Kingswinford*, 7 B. & C. 236.

31. The rent is the criterion of the value of the occupation of the land; and the proprietors of a canal are rateable for the sum at which it would let, and not for their gross receipts, minus their expenses. *Rex v. The Trustees of the Duke of Bridgewater*, 9 B. & C. 68.

32. By an act of Parliament, certain persons were authorized to make the rivers Mersey and Irwell navigable from Liverpool to Hull, and to maintain such navigation; and, for those purposes, to clear, cleanse, scour, open, enlarge, or straighten the river, and to dig and cut the banks, and to make new cuts, trenches, or passages for water through lands adjoining, and to build bridges, sluices, locks, &c., and to do all other things necessary for making and maintaining the navigable passage, first giving satisfaction to the owners of lands; and, in consideration of the expenses to be incurred, the undertakers were authorized to take for their own proper use and behoof certain tolls. The undertakers made the river navigable, scoured and cleansed the same, and purchased lands for towing-paths and cuts:—*Held*, that they were not liable to be rated to the poor for land taken for the purpose of the navigation, because they were not occupiers of that

land, but had a mere easement in it. Secondly, that they were liable to be rated for the new cut. Thirdly, that they were liable to be rated for the weirs, locks, and dams erected on their lands. *Rex v. Mersey and Irwell Navigation Company*, 9 B. & C. 95.

33. By an act of Parliament certain persons were authorized to make the river Avon navigable from B. to H., and to maintain such navigation; and, for those purposes, to clear, scour, open, enlarge, or straighten the river, to dig and cut the banks, to make new cuts, trenches, or passages for water through lands adjoining; and to build bridges, sluices, locks, &c., and to do all other things necessary for making and maintaining the navigable passage, first giving satisfaction to the owners of lands; and commissioners were appointed to settle what satisfaction every person should have for such proportion of his land as should be cut, dug, removed, or made use of for carrying on the undertaking, and to settle what proportion of such purchase-money or satisfaction every person, having a particular estate or interest on any of the premises, should have for his respective interest; and, in consideration of the expenses to be incurred, the undertakers were authorized to take for their own proper use and behoof, certain tolls. The undertakers made the river navigable, scoured and cleansed the same, and made a certain cut and lock for the purposes of the navigation, upon lands purchased by them:—*Held*, that they were not liable to be rated to the poor for the land covered with water, being part of the river Avon, because they were not occupiers of that land, but had a mere easement in it. Secondly, that they were liable to be rated for the cut and lock. *Rex v. Thomas*, 9 B. & C. 114: *S. C. nom. Rex v. Avon Company*, 4 M. & R. 23.

34. Tolls vested by statute in com-

missioners, to be applied to the purposes of the act, and no other use whatsoever, are not rateable to the poor. *Rex v. Canal Navigation*, Nolan, 90.

35. Where a Canal Company were authorized to receive a mileage toll for goods conveyed on the canal, and in lieu of the mileage duty distinct tolls on all vessels passing through two locks, it was held, that the whole annual profits of the locks were, for the purpose of being rated to the relief of the poor, to be considered as having been produced in that parish where the locks were situate, and not in the several parishes through which the canal passed, in proportion to the length of the canal in each parish.

The annual profit is the rent which a tenant would give, he paying the poor rates and the expenses of repairs, and the other annual expenses necessary for making the subject of occupation productive, and allowing him a deduction from the rent, where the subject is of a perishable nature, towards the expense of renewing or reproducing it. *Rex v. The Inhabitants of Lower Mitton*, 9 B. & C. 810.

36. An act of Parliament of the 9 & 10 Will. 3 gave to certain undertakers authority to make navigable the river Aire, and for that purpose to cleanse and scour the same, and dig and cut the banks. By a subsequent act, reciting that the legal estate and interest in the navigation of the said river, and divers messuages, mills, warehouses, buildings, lands, tenements, and hereditaments, was vested in trustees, they were authorized by deed to sell and convey in fee such messuages, mills, lands, or tenements, belonging to the undertakers, or to convey in fee, by way of mortgage, as well the said navigation as also all or any messuages, mills, lands, tenements, and hereditaments, being the property of the undertakers:—*Held*, that the word "navigation," in that act, imported an incorporeal he-

reditament, and that it authorized the trustees to mortgage in fee that incorporeal hereditament, and the first act having given the undertakers an incorporeal hereditament only in the bed of the river, they were not rateable to the poor as occupiers or owners of the river Aire. *Res v. The Undertakers of the Aire and Calder Navigation*, 9 B. & C. 820.

37. By a canal act, the proprietors of the Oxford Canal were empowered to take a mileage tonnage for coals and other merchandizes, excepting that they were not to take a tonnage upon coals for a distance of two miles measured from L. to B. As to those two miles, it was enacted that the proprietors of the Coventry Canal should take all the rates and duties payable by virtue of that act, for all coals carried from any part of the Oxford Canal within those two miles; and the proprietors of the Oxford Canal were to take all the rates, payable by an act for making the Coventry Canal, for all goods, except coals, conveyed upon any part of the Oxford Canal, and afterwards upon the Coventry Canal, within three miles and a half of the junction of the two canals. The point of junction of the Oxford and Coventry Canals was in the parish of F. That parish contains one mile and nine hundred and sixty-three yards of the Oxford Canal, being part of the two miles above mentioned, and also two miles and a quarter of the Coventry Canal, being part of the three miles and a half above mentioned.

By an act 33 Geo. 3, c. 80, for making the Grand Junction Canal (reciting that it was apprehended the intended canal would be injurious to the company of proprietors of the Oxford Canal), it was agreed that the compensation thereafter mentioned should be made to them as an indemnification against such injury. It then authorized the proprietors of the

Oxford Canal to take, for all coals that should pass from the Oxford Canal into and upon the Grand Junction Canal, the sum of 2s. 9d. per ton, without regard to the distance the same should pass on the Oxford Canal; and for all other goods which should pass from any navigable canal into or upon the Oxford Canal, and from thence into or upon the Grand Junction Canal, or from the Grand Junction Canal into or upon the Oxford Canal, and from thence into or upon any other canal, the sum of 4s. 4d. per ton, without any regard to the distance the same should pass on the Oxford Canal:—

Held, first, that the proprietors of the Oxford Canal were rateable to the poor in the parish of F. for the mile tonnage for merchandize, not being coals, passing along the Oxford Canal in that parish. Secondly, that they were rateable in that parish, for the mile tonnage payable to them in respect of tolls collected on the Coventry Canal, in the proportion which one mile nine hundred and sixty-three yards bears to two miles. Thirdly, they were rateable in that parish for such a proportion of the compensation tonnage payable to the Oxford Canal Company, under the Grand Junction Canal Act, for merchandize, not being coals, passing from the Coventry Canal, along the Oxford Canal to the Grand Junction Canal, and vice versâ, and, consequently, through the parish of F., as one mile nine hundred and sixty-three yards bears to thirty-four miles and seven-eighths, the distance between the points at which the Oxford Canal joins the Coventry and Grand Junction Canals. Fourthly, that they were rateable in that parish for the same proportion of the compensation tonnage for coals, passing along the same portion of the Oxford Canal from the Coventry Canal into the Grand Junction Canal:—*Held*,

further, that in fixing the amount of the rate, the sum paid by the proprietors for the poor-rate, the expense of collecting the tolls, of repairing the banks of the canal, and of supplying it with water, ought to be deducted from the gross profits. *Rex v. Oxford Canal Company*, 10 B. & C. 163.

38. A bridge was erected over a navigable river, pursuant to the provisions of an act of Parliament. The proprietors purchased on each side of the river, in parishes A. and B., land on which they erected a pier and an abutment. They were authorized to erect toll-gates, and to take certain tolls, before any foot passengers, &c., should be permitted to pass or return over or through the bridge. The proprietors took tolls at one side of the bridge only in parish A.:—*Held*, that they were rateable to the relief of the poor for the land occupied by them in parish B. *Rex v. The Inhabitants of Barnes*, 1 B. & Ad. 113.

39. Where a statute empowered the proprietors of a canal to make rates in respect of vessels navigating the same, and expressly exempted such rates from the payment of all taxes, rates, &c., it was holden that the land occupied by the canal was also thereby exempted from poor's rate. *Rex v. Calder and Hebble Navigation Company*, 1 B. & A. 263.

40. Commissioners of a navigation having borrowed £28,000 on mortgage, and being still in want of funds, agreed to let the navigation and tolls for ninety-nine years, the lessee undertaking to make certain advances (which he did), and to pay the interest of the £28,000. Part of the term having expired, and the validity of the agreement being doubted, an act was passed, reciting, that that agreement had been entered into bona fide, had been beneficial to the public, and would be so if continued: it therefore empowered the commissioners to lease the navigation and tolls (which,

however, were lowered) for the remainder of the term, to the persons entitled under the former agreement; and enacted, that they should pay the interest of the £28,000 yearly to the mortgagees, in default of which the commissioners might require the toll collector to pay such interest to the mortgagees out of the monies in his hands; on appeal against a rate laid upon the lessees in respect of the navigation:—*Held*, that the interest paid by the lessees was in substance a rent, and that the rate ought to be calculated upon it, and that the lessees were not occupiers under a beneficial lease, though the interest was only £1400 a-year, and the annual earnings, at the time of making the rate, were £3418, (from which, however, about £1000 was to be deducted for repairs, &c.); one year's value being no criterion, and there being no proof that the rent was unduly small. *Rex v. Chaplin*, 1 B. & Ad. 926.

41. By an act for making a navigable communication between two places therein mentioned, a Company was formed, and authorized to purchase lands, &c. for the navigation, and to make and maintain the same. The act then directed that the Company should be rated and charged to all parliamentary and parochial taxes, rates and assessments for any lands to be purchased or taken, or warehouses, or other buildings to be erected by them in pursuance of that act, in the same proportions as other lands and buildings adjoining to or lying near the same were or should be rated and charged:—*Held*, that the Company were liable to be rated for their lands and buildings at the same value as other adjacent lands and buildings, and not according to the improved value derived from their being used for the purposes of the navigation. *Rex v. The Chelmer and Blackwater Navigation Company*, 2 B. & Ad. 14.

42. Persons in whom the navigation of a river is vested, but who have no interest in the soil, are not rateable to the poor for a dam which upholds the water of such river, and renders it navigable. *Rex v. The Undertakers of the Aire and Calder Navigation*, 3 B. & Ad. 139.

43. The owners of mills in the township of H., in compensation for the loss of water occasioned to them within the township by an adjoining navigation, were allowed, by act of Parliament, to take certain tolls at a lock situate on the line of navigation, but in a different township:—*Held*, that they were not rateable at their mills in H., in respect of the tolls so taken. *Same v. Same*, Id. 533.

44. Certain proprietors were, by two statutes, appointed undertakers of the River Dun Navigation, and empowered to make cuts and other works. By a subsequent statute they were united in one Company, and it was enacted, that the said Company should not "be taxed or assessed for the same or the profits thereof, at any place except S. or D." The clause immediately preceding contained nothing to which "the same" could refer. By a later statute, reciting, that it was found expedient that the Company should abandon part of the old navigation, and make new cuts in lieu thereof, they were empowered to make such cuts, and afterwards to take certain new rates and duties. And it was then enacted, "That the intended cuts or canals, alterations and works, shall be considered and taken as part of the navigation of the river Dun, and all and every the provisoes, directions, restrictions, penalties, and forfeitures in and by the before recited acts, respecting the boatmen employed on the said river, the owners of boats, keels, or vessels, or other persons employed thereon, on passing the locks of the said river, or making obstructions therein, or in any

other respect relating thereto, or for the benefit or protection of the said navigation, and all other powers and authorities therein contained, shall extend and be applicable to the said cuts or canals, alterations and works, as fully in every respect as if the said cuts, &c. had originally been parts of the said navigation, and had been inserted in the said acts:"—*Held*, that the words "the same, or the profits thereof," in the first exempting statute, must be taken to mean the then navigation, so far as any part of it was the subject of rate, and that the navigation, so far as it would otherwise have been rateable, was thereby exempted from the poor rate; and that the subsequent act, by incorporating the new cuts with that navigation, extended the exemption to them without such incorporation. *Quære*, whether the words beginning "and all and every the provisoes," &c. would have exempted the new works? *Rex v. The Inhabitants of Barnby Dun*, 2 A. & E. 551; 4 N. & M. 436.

45. By a canal act, passed in 1792, when tolls were considered rateable per se, a Company was incorporated, and authorized to take lands, and to take and erect buildings for the purpose of constructing a canal and railways, and to take tolls; and it was provided that the tolls should not, at any time or times thereafter, be subject to taxes or rates, and that the Company should, from time to time, be rated in respect of the lands and grounds to be taken, and the buildings to be erected by them, in the same proportion as, and not at any higher value or improved rents than, other lands, grounds, and buildings to be taken and erected by them would have been rateable, in case they had continued in their former state, and not been used for the purposes of the undertaking. The adjacent lands and buildings improved in value, from

the time of the commencement of the undertaking, partly in consequence of the undertaking being carried into effect, partly from independent causes:—*Held*, that the lands and buildings used for the canal were to be rated at the value which the adjacent lands &c. bore at the time of the rate; and not at the value which these latter bore at the commencement of the undertaking, nor at that which they would have borne at the time of the rate, if the undertaking had not been carried into effect. Although from the passing of the act to the time of the question being raised (40 years), the rate had always been made according to the original value of the lands adjacent.

A subsequent statute authorized the Company to extend the canal, and to purchase lands for that purpose; and it provided that they might take the like tolls on the new canal &c. as under the former act, and have the like powers and remedies for recovering them; and that the clauses, powers, authorities, provisoes, orders, rules, regulations, limitations, exemptions, restrictions, privileges, penalties, forfeitures, punishments, and provisions contained in the former act, should, so far as the same would apply and the case would admit, extend to the new canal, &c., and should take effect, operate, be put in execution, used and exercised by the Company, and be applied and enforced in respect of making, maintaining, and using the new canal, &c., and regulating the navigation thereon, for punishing offences relating thereto, for purchasing lands, and assessing damages, and with respect to all matters in anywise touching the new canal, &c., in the same manner to all intents and purposes as if the same clauses, &c. had been inserted, repeated, and enacted at full length by the subsequent act, and as if the new canal, &c. had been a part of the canal authorized to be made by the for-

mer act:—*Held*, that the provision as to rating the original canal extended to the new part.

By a third statute, a Tramroad Company was incorporated, and it and the Canal Company were authorized to make railways, and to take such tolls on their railways as the Canal Company might take by the first statute; and it was provided that the clauses, powers, authorities, regulations, &c. (as in the second statute), of the first statute should extend (in the same terms as in the second) to the railways last mentioned, and to regulating the carriage or conveyance of goods thereon, as if these railways had been authorized to be made by the first statute, and the Tramroad Company had been therein named instead of the Canal Company:—*Held*, that the provision as to rating the original canal extended to these railways. *Rex v. Monmouthshire Canal Company*, 3 A. & E. 619; 5 N. & M. 68.

46. By a local act, the soil of a river was vested in trustees of a navigation, who were to receive the profits of such navigation, and apply them in the first instance in repairs and amendments, and in keeping the river navigable, &c. By the same act, confirming certain articles of agreement, it was provided, that M. should receive out of the profits of the said navigation, so much for every ton, &c. navigated on the river, and that D. should receive so much for every ton navigated on the said river within his own land, situate in the parish of S., and that the trustees should pay to the persons, to whom any shares of the profits should be allotted, in the manner provided by the act, such respective shares yearly, after deducting the costs of repairing and amending the premises, and executing the trusts; satisfaction for damage to lands, &c., by cutting passages or heightening the waters, was to be paid by the

trustees out of the profits of the navigation, before the persons entitled to shares of the profits should receive such shares. Tolls were taken as follows:—on vessels using the whole line of the navigation, 4s.: between a certain point above the parish of W., and the beginning of W., 3s.: from the beginning to the end of W. (and to a point below), 2s. 6d.: from thence to the lower end of the navigation, 2s.:—*Held*, first, that the poor-rate payable by the trustees for the part of the navigation in W. was to be estimated, not by the increase of toll taken within W., but by a mileage calculation, the gross amount of toll upon any voyage, including W., being distributed evenly over the line travelled, and the amount payable by W. being calculated by the proportion which the length of navigation in W. bore to the whole of the line travelled, whether the voyage extended over the whole length of the navigation, or a part of it, including W. Secondly, the expense of repairs being equal through the whole line, that the amount of such repairs was to be deducted on a like mileage calculation. Thirdly, that, in estimating the rateable profits, the compensations to M. and others were not to be deducted. And this, even in the instance of compensation for injury to a mill, situate within the parish of W. Fourthly, also (on the assumption that lands in W. were rated at rack rent, and no more), that ten per cent. was to be deducted from the rateable amount, for the tenant's profit. *Rea v. The Inhabitants of Woking*, 4 A. & E. 40; 5 N. & M. 395.

47. By statute 10 Geo. 3, c. 114, the Company of Proprietors of the canal navigation from Leeds to Liverpool were incorporated and empowered to make a canal, with towing paths, wharfs, quays, &c., and to impose tolls and duties; and it was enacted, that the tolls, &c. should at all times

thereafter be exempted from the payment of any taxes, rates, assessments, or impositions, other than such as the land which should be used for the purpose of the navigation would have been subject to, if that act had not been made. Statute 23 Geo. 3, c. 47, (for incorporating another navigation with the canal, and for amending the preceding act), enacted, that the several navigations, cuts, or canals, and the tolls, &c., to be taken on the same, should at all times be exempt from the payment of any taxes, rates, assessments, or impositions, other than such as the land which had been or should be used for the purpose of such navigations, &c., were or would have been subject to, if that act had not been made; and that such navigations, cuts, or canals, should not be subject to the payment of any taxes, &c., except such as had been and then were usually charged and assessed thereon; but this was not to exempt any quay, wharf, warehouse, or other house; and the clause in the previous act, exempting the tolls, &c., from taxes, rates, &c., was declared to be repealed. Statute 59 Geo. 3, c. cv, (local and personal, public), for enabling the company to make additional cuts, &c., declared that the clauses, powers, provisions, limitations, restrictions, exemptions, matters, and things contained in the former acts (except such as had before been repealed, or were by that act repealed or altered), should extend to the purposes of that act, as if re-enacted; and that the lands, dwellings, houses, wharfs, quays, warehouses, lock-houses, and other houses of the company, should be rateable to the poor; the lands according to the quantity and quality, and as dwelling-houses, warehouses, lock-houses, and other houses of like and similar size, nature, dimensions, or description, in the respective parishes, &c., where the same

should be situate, were or should be assessed and charged; the rates, duties, and other personal property of the company to be assessed as other personal property, in the said parishes, &c.:—*Held*, on a case stated as to poor-rate in the parish of Liverpool, where no personal property was assessed to the poor, 1. that the land occupied by canal, basins, and towing paths, being part of the original line, was to be rated according to the general value borne at the time of the rate by the land immediately adjoining, not excluding the value which such land derived from the vicinity of the canal, but not reckoning the value which such land would acquire, if applied to the purposes of a canal. 2. That the land occupied by cuts and basins, not being in the line prescribed in any of the acts, was to be rated on the same principle. 3. That wharfs and quays adjacent to the last-mentioned cuts and basins, were to be rated as similar property adjacent, not excluding the value which such adjacent property derived from the vicinity of cuts and basins. *Reg. v. Leeds and Liverpool Canal Company*, 7 A. & E. 671; 2 N. & P. 540.

RECEIVER.

See ACQUIESCENCE, 2.

REINSTATE.

See MANDAMUS, 3.

REPAIRS.

See RATING, 3, 28, 29, 35, 37, 40, 46. *WORKS*, 8.

An order specifically to repair the banks of a canal and stop-gates, &c. refused. But by injunction restraining defendant from impeding plaintiff from navigating, &c., by continuing to keep banks, &c. out of repair, &c., the effect of such former order was given. *Lane v. Newdigate*, 10 Ves. 192.

SHARES.

RESERVOIR.

See MINES, 3.

SEAL (OF COMPANY).

See AGREEMENT, 6.
CORPORATION, 2, 5.

SESSIONS.

See ACCOUNTS.
MANDAMUS.
RATING, 14.

SET-OFF.

See ARBITRATION, 1.

SEWER.

See MANDAMUS, 5.

SHARES.

See ACCOUNT, 1.
BANKRUPT, 3, 7.
DOWER.
EXECUTORS.
PROPRIETORS.
RATING, 2.

(*Equity*).

1. Where a Company is formed by act of Parliament for the purchase of lands to make a canal, and the act declares that the shares "shall be deemed personal estate, and shall be deemed transmissible as such:"—*Held*, that though the profits arose out of the land, the shares were personal property, passing as such to the assignees on the bankruptcy of a proprietor. Where an act prescribes certain forms in the transfer of such shares:—*Held*, unless they are strictly complied with, the shares remain in the order and disposition of the bankrupt proprietor, the ordinary mode of transfer not constituting an equitable mortgage; and though only expressly relating to transfers between third parties, yet it impliedly relates to where the Company are the transferees. *Ex parte Lancaster Canal Company, re Dilworth, &c.*, 1 Dea. & Ch. 411.

TAXES.

2. Canal shares, if deemed personal property, are within the clause of reputed ownership. *Id.*, Mont. 116.

3. A. employed B., a stock-broker, to purchase some canal shares. B. apparently bought them from C. the ostensible owner, but who afterwards turned out to be a mere trustee for B. The Court, after a lapse of several years, and without entering into the question of the fairness of the price—*Held*, that the transaction was void, on the ground of public policy, and set it aside with costs. *Gillett v. Peppercorn*, 3 Beav. 78.

(*Law*).

4. By a railway act, it was declared that the shares in the undertaking, or the joint stock and fund of the Company, should, to all intents and purposes, be deemed personal estate, and be transmissible as such, and should not be of the nature of real property:—*Held*, that the shares of individual proprietors were not an interest in land, and, therefore, might be sold by a verbal contract. And, *semble*, this would have been so even if the act had contained no such clause. *Bradley v. Holdsworth*, 3 M. & W. 422.

SPECIFIC PERFORMANCE.

See AGREEMENT, 6.

STAMP.

See TOLLS, 8.

SUBSCRIBERS.

See PROPRIETORS.

SUBPCENA.

See PRACTICE, 5.

SURVEYOR.

See COSTS, 8, 9.

TAXES.

See VENDOR, 2.

TOLLS—TONNAGE. 79

TENANT.

See COMPENSATION, 10, 12, 20.

COSTS, 2.

EJECTMENT, 2.

TIME.

See QUIESCENCE, 2.

AGREEMENT, 5.

COMPENSATION, 22.

CORPORATION, 6.

DEVIATION.

DOCK, 2.

EASEMENT, 1.

LIMITATION.

MANDAMUS, 2.

NAVIGATION, 8.

TITHES.

See COMPENSATION, 8.

TITLE.

See BANKRUPT, 7.

CONSTRUCTION OF STATUTES,
8, 9.

TOLLGATE.

See RATING, 7, 38.

TOLLS—TONNAGE.

See ACCOUNTS, 4.

ACQUIESCENCE, 2.

ACTION, 12.

CONSTRUCTION OF STATUTES,
10, 11, 12.

DOCK, 6, 7, 9.

LIMITATION, 5.

PUBLIC, 5.

RATING.

(*Equity*).

1. The Monmouthshire Canal Act provided, that upon auxiliary railroads made by private individuals under the authority of the act, the tolls should not exceed the rate charged by the Canal Company, which for the articles of limestone and ironstone was restricted to 2½d. a ton per mile; and it also empowered the Canal Company, by agreement with the land-

owners, itself to construct auxiliary railroads, on which tolls not exceeding 5*d.* a ton per mile might be charged. Certain landowners and owners of iron works, and among others the lessees of the Beaufort works, formed a joint Company, and under the powers given by the act, constructed a railroad, connecting a lime quarry called the Trevil Quarry with the several iron works and with the railroads of the Canal Company. In the partnership deed of the Railway Company, the lessees of the Beaufort works covenanted for themselves, their heirs, executors, administrators, and assigns, so long as the covenantors, their executors, administrators, or assigns should occupy the Beaufort works, to procure all the limestone used in the said works from the Trevil Quarry, and to convey all such limestone, and also all the ironstone from the mines to the said works along the Trevil railroad, and to pay a toll of 5*d.* a ton per mile for the same:—*Held*, that the covenant securing a toll of 5*d.* per ton per mile to the shareholders of the railroad, was a fraud on the Canal Company and the legislature, and, therefore, ought not to be specifically enforced by injunction. *Keppell v. Bailey*, 2 My. & K. 518.

2. A Canal Company, who, in order to make their canal navigable for vessels drawing four-and-a-half feet of water, were authorized to levy certain increased dues, were not entitled to do so before the canal was so navigable:—*Held*, that they were liable in repetition of the dues exacted prior to the canal being so rendered navigable; and that a party having acquiesced in a judicial remit to a person of skill was not thereafter entitled to insist on a proof in regard to facts reported on by that person. *Dixon v. Monkland Canal Company*, 1 Wil. & Sh. 636; 5 Id. 445.

(*Law*).

3. Where, by a statute, a Canal

Company were empowered to take such rates as should be fixed at a general assembly of the proprietors, not exceeding one penny, &c., per ton per mile upon coal; and they were also empowered to reduce the rates at a general assembly held on certain notice; but no reduction was to be made without the consent of the major part in value of the proprietors: a contract made by individuals with the Company, but not at such general meeting, whereby, in consideration that those individuals would make a navigable cut to convey water from their collieries through land not within the statutable line of the canal, into the canal, and convey the same to the Company, the latter should permit them to carry their coals through the cut and along the canal for 1*s.* per ton, the Company paying back 6*d.* per ton, is illegal and void; 1st, as a speculation by which the Company might gain more or less than the legislature intended they should take under similar circumstances from the public in general; 2ndly, as extending in effect the power of the Company to purchase land beyond the limits assigned by the act; 3rdly, as enabling them to raise more capital than they were entitled by the act to do, by means of paying for land or works by a total or partial sale of their tolls; which tolls are made a security for the money subscribed or taken up on mortgage; 4thly, because the tolls could in no instance be reduced but at a general assembly, &c.; and this, in fact, operates as a reduction of the tolls *pro tanto*; also *quære*, 5thly, whether such a contract be not void, as diminishing the inducement (by favouring individuals) to a general reduction of the tolls, when proper, for the benefit of the public? *Lees v. The Manchester Canal Navigation*, 11 East, 645.

4. A canal act gave a higher rate of tonnage for light goods than for heavy

goods; if a jury find that certain goods were heavy goods when the act passed, ten years subsequent consent of the country to consider the same species as light goods will not entitle the Canal Company to demand for these the toll on light goods. *Staffordshire and Worcestershire Canal Company v. Trent and Mersey Canal Company*, 6 Taunt. 151.

5. By an act for making and keeping a river navigable, it was enacted, that certain persons therein mentioned should be conservators, and that for reimbursing them what should be laid out for the purposes of the act, with £6 per cent. interest, until they had been paid the principal and interest of what they had disbursed, or should thereafter disburse, every vessel navigating the river should pay to the conservators certain tolls, viz. a sum not exceeding 4d. for every weight of coals, &c.; and that, in default of payment of such sums, it should be lawful to detain the vessel; and that, after the conservators should be fully reimbursed, certain less tolls, that is, the sum of 1d. for every weight of coals, &c., should be paid and no more. By a subsequent act, reciting, that it was necessary to erect a lock on a certain part of the said river, it was enacted, "that from and after the building of the lock, an additional toll should be collected and paid to the conservators at the lock, viz. the sum of 1s. over and above the sum of 4d. for every weight of coals granted by the former statute;" and the same remedy was given for non-payment:—*Held*, that, as the two acts were *in pari materid*, the clause giving the additional toll in the second act was to be construed with reference to that giving the toll in the first act, and that so construing it, the true meaning was, that until the conservators were fully reimbursed, they were at liberty to take a less toll than that specified in the last-mentioned sta-

tute. *Rex v. River Tone Conservators*, 1 B. & A. 561.

6. A canal act directed, that no boat navigating therein, which should not be capable of carrying a greater burden than twenty tons, or which should not have a loading of twenty tons on board, should be allowed to pass through the locks, unless on payment of tonnage equal to a boat of twenty tons:—*Held*, that this was not confined to boats carrying some loading, but that empty boats came within the meaning of the clause; and that for them toll was payable as on boats having a loading of twenty tons:—*Held*, also, that the act having imposed different rates of toll on different goods carried along the canal, the tonnage on an empty boat was to be calculated at the lowest rate applicable to any species of goods. *Hollinshead v. The Leeds and Liverpool Canal Company*, 2 B. & A. 66, (overruled by the *Leeds and Liverpool Canal Company v. Hustler*, 1 B. & C. 424; and see 59 Geo. 3, c. 105, which imposes a simple lockage duty of 5s. on empty boats). See *post*, 9.

7. Where, by a canal act, a toll of 1s. per ton was imposed upon all coal, &c., navigated upon any part of the canal, from a place A., or from any place within two miles thereof:—*Held*, that this only applied to voyages commencing within those limits, and that no such toll was payable for coal loaded at a place more than two miles from A., although conveyed upon a part of the canal within two miles of A. *Brittain v. The Cromford Canal Company*, 3 B. & A. 139.

8. An act of Parliament provided, that the Monmouthshire Canal Company should not take any higher or greater rate of tonnage than should, for the time being, be taken by the Bristol Canal Company; and the latter, by a resolution at a general assembly, and under their common seal, reduced their tolls:—*Held*, that the Mon-

mouthshire Canal Company could not question collaterally the validity of such resolution, but were bound by it.

The Bristol Canal Company's Act directed that no reduction of the tolls should take place unless assented to by two-thirds of the proprietors; but allowed them to vote by proxy, a form for which instrument was given by the act. *Quære*, whether such instrument requires to be stamped? *Monmouthshire Canal Navigation v. Kendal*, 4 B. & A. 453.

9. Where a canal act directed "that no boat navigating upon the said canal, which shall not be capable of carrying a greater burden than twenty tons, or which shall not have a loading of twenty tons, shall be allowed to pass through any of the locks, unless the owner or navigator of such boat shall pay tonnage equal to a boat of twenty tons;" and, it appearing that in no part of the act was a boat, *per se*, made liable to any toll; but that all the provisions as to tolls applied exclusively to goods conveyed on the canal:—*Held*, that the clause in question was confined to boats carrying some loading, and did not attach upon an empty boat passing the locks, reversing the decision in 2 B. & A. 66. *The Leeds and Liverpool Canal Navigation v. Hustler*, 2 D. & R. 556; 1 B. & C. 424.

10. Where the expenses of passing an act of Parliament are directed by the act to be defrayed out of certain tolls to be levied under the act, it is incumbent on the party who sues for the expense of soliciting the act, to shew that tolls have been collected sufficient to cover his demand. *Andrews v. Dally*, 4 Bing. 566; 1 M. & P. 490.

11. An act of Parliament constituted a Company for the purpose of making and maintaining a canal to be passable for boats. All persons were to be allowed to navigate the canal, and certain tolls were payable by them to

the Company. The act also provided, in case of obstruction by any sunken vessel, the owners of which should not weigh it up within a certain time, that it should be lawful for the Company to do so, and to keep the same till payment were made of all expenses thereof:—*Held*, that these words were compulsory upon the Company, and that they were liable, in an action on the case, for an injury occasioned by their non-removal in due time of a sunken vessel. *Parnaby v. The Lancaster Canal Company*, 3 N. & P. 523; S. C. (in error) 11 A. & E. 223.

12. A Canal Company were authorized, by statute, to demand and sue for certain tolls upon the carriage of goods, and to distrain any carriage or goods in respect of which any such tolls ought to be paid, and to detain the same until payment made of such tolls, and of all arrears of the same then due from the owner of such carriage or goods; and in case such distress should not be redeemed within five days, to appraise and sell the same, as in the case of a distress for rent; they were not expressly authorized to levy any toll upon carriages:—*Held*, that trams could not be distrained for arrears of tolls due from the owners for goods carried in them, if they were not carrying goods of such owners at the time of the distress.

The statute enacted, that any action, brought for anything done in pursuance of the act, or in execution of the powers and authorities granted by it, should be brought within six calendar months next after the fact committed:—*Held*, first, that such a distress was a thing done in pursuance of the act; but, *Held*, secondly, that where an owner of trams let them to a third person, and, during such letting, they were illegally distrained for arrears due from the person hiring, while not carrying such person's goods, and afterwards sold, such owner might sue within six months from the time of

TOWING PATH.

sale, on a count complaining of injury done to his reversionary interest by the seizure and sale. *Jenkins v. Cooke*, 1 A. & E. 372.

13. In case for rescous of goods distrained for toll under the authority of a statute, which gives a right to distrain particular goods only, the declaration must shew that the goods taken were such as plaintiffs were empowered to distrain. But a declaration for pound-breach of such goods is sufficient, though it discloses no right of distress.

A special demurrer to two or more counts, commencing by alleging that the declaration is insufficient in law, but assigning separate causes to each count, is a demurrer to the whole declaration. *Parrett Navigation Company v. Stower*, 8 Dowl. 405.

TOWING PATH.

See **RATING**, 46.

1. The right to the soil of a navigable river is not by presumption of law in the owners of the adjoining lands. *Res v. Smith*, 2 Doug. 441.

2. A right to a track path on each side of the river Tees (alternately) for towing, without paying any acknowledgment, was found upon a trial at bar. *Pierce v. Fauconberge (Lord)*, 1 Burr. 292.

3. The public are not entitled at common law to tow on the banks of ancient navigable rivers. *Ball v. Herbert*, 3 T. R. 253.

4. If an act of Parliament for inclosing and allotting the common and waste lands of a parish through which a navigable river flows, empower commissioners to set out such public and private roads and ways as they shall think necessary, and direct that all roads and ways not so set out shall be deemed part of the lands to be allotted, an ancient towing path upon the banks of the river, though not set out by the commissioners, still sub-

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sists, for it is not within their jurisdiction. *Simpson v. Scales*, 3 B. & P. 496.

5. A statute authorizing the making of a new course for a navigable river, and turning the old part into a floating harbour, will not, without words for the purpose, put an end to a public towing path upon that part; but such towing path will be liable to be used as such for the purposes of the harbour, and it will make no difference though the river was a tide river, and not navigable at low water. *Res v. Tippet*, 1 Russ. C. & M. 317.

6. A prescriptive right of way on a public towing path on the banks of a navigable tide river, is not destroyed by that part of the river adjoining the towing path having been converted by statute into a floating harbour, although such towing path was thereby subject to be used at all times of the tide, whereas, before, it was only used at those times when the tide was sufficiently high for the purposes of navigation; and such prescription is not destroyed by a clause in the statute, whereby the undertakers of the work were authorized to make a towing path over land, comprising the towing path in question, on paying a compensation to the owner of the soil. *Id.*, 3 B. & A. 193.

TRANSFER.

See **SHARES**.

TRESPASS.

See **ACTION**, 7, 8, 9, 10.
EASEMENT.

TROVER.

See **ACTION**, 17.
BANKRUPT, 6.

VENDOR AND PURCHASER.

1. Vendor not entitled to have purchase-money brought into Court, the agreement admitted by the answer

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differing from that stated by the bill. *Benson v. The Glastonbury Navigation Company*, Coop. Ch. Ca. 42.

2. Estate consisting of fen lands, and so described in particulars of sale, was charged by a local but public act of Parliament with drainage and embanking taxes, of which purchaser had no express notice:—*Held*, he was not entitled to compensation for those taxes. *Barraud v. Archer*, 2 Sim. 433.

3. By an act of Parliament establishing a Canal Company, the committee of the Company had power, in case any person who should agree with the Company for sale of any commons or waste lands should not be able to make a good title to the satisfaction of the committee, or in case any person entitled to commons or waste lands to be purchased by the company could not be known, to order the purchase-money to be paid into the Court of Chancery. In 1812 a contract for the purchase of certain lands on P. Common was entered into by the company with S., a party whose title to sell was then doubtful. The Company, however, took possession of the lands, and never paid the purchase-money into Court. In 1827 an act was passed for the inclosure of P. Common, and, in 1837, an award was made, pursuant to that act, by which the arbitrator found that S. was the true owner of the lands in question:—*Held*, that the Company were trustees of the purchase-money for S., and those claiming under him, and that as the legislature had permitted a bargain, with an unascertained person, S., and those claiming under him, were guilty of no laches in not filing a bill against the Company for the recovery of the purchase-money before 1837, the period when the true ownership was ascertained. Where a trustee admits that the trust-money has not been paid, but that it has remained for a length of time in his hands—*quære*, whether

any length of time will operate as a bar to the lawful claimant in a Court of equity?

Where the title to a contract is made out, by shewing the title to the land which is the subject of the contract, the Court will enter into the question of the title to the land at the time of the contract; and if the party insisting on the contract makes out a good title to the land at that time, the Court will direct a reference to the Master as to the subsequent title. *Cator v. The Croydon Canal Company*, 4 Y. & C. 405.

VENUE.

It is not necessary to give a local description to the nuisance in an action for diverting the water of a navigation; and, therefore, if it be doubtful whether the place where such navigation is stated to lie be laid in the declaration as a venue, or as local description, it will be referred merely to venue, and need not be proved to be at such place, but it is sufficient if it be at any other place within the county. *The Mersey and Irwell Navigation Company v. Douglas*, 2 East, 497.

VIEW.

See ARBITRATION, 2.

WAGGON-WAY.

See NUISANCE, 6.

RATING, 10.

WAIVER.

See AGREEMENT, 5.

Answering an affidavit is a waiver of any objection which might be taken to it, on the ground of notice not having been given that it was to be used. *Blackmore v. The Glamorganshire Canal Company*, 5 Russ. 151.

The right to process, under an undertaking for a serjeant-at-arms, &c., immediately on exceptions to the re-

port of an insufficient answer disallowed, is waived by plaintiff's taking out a subpoena for a better answer, and excepting to the report entitling defendant to eight days after the exceptions are disposed of. *Agar v. Regent's Canal Company*, 19 Ves. 379; *S. C. Coop.* 221.

WARRANT.

See COMPENSATION, 1.

WATER—WATERCOURSE.

See ACTION, 18.

COMPENSATION, 28.

LIMITATION, 2.

MINES, 2.

NAVIGATION.

NUISANCE, 2, 3, 4, 7.

RATING, 15, 28.

(*Equity*).

1. Principle of the right to use of river water. *Wright v. Howard*, 1 S. & S. 203.

(*Law*).

2. On indictment for nuisance to a public canal navigation established by act of Parliament, it appeared that the canal was carried across a river and the adjoining valley by means of an aqueduct and an embankment, in which were several arches and culverts; that a brook fell into the river above its point of intersection with the canal, and that in times of flood the water, which was then penned back into the brook, overflowed its banks, and was carried, by the natural level of the country, to the above-mentioned arches, and through them to the river, doing, however, much mischief to the lands over which it passed; that except for the nuisance after mentioned, the aqueduct would be sufficiently wide for the passage of the river at all times but those of high flood, notwithstanding the improved drainage of the country, which had increased the body of water; that

the defendants, occupiers of land adjoining the river and brook, had, for the protection of their lands, subsequently to the making of the canal, aqueduct and embankments, erected or heightened certain artificial banks, called fenders, on their respective properties, so as to prevent the flood-water from escaping, as above mentioned, and that the water had consequently, in time of flood, come down in so large a body against the aqueduct and canal banks as to endanger them, and obstruct the navigation; that the fenders were not unnecessarily high, and that, if they were reduced, many hundred acres of land would again be exposed to inundation:—*Held*, that the defendants were not justified, under these circumstances, in altering for their own benefit the course in which the flood-water had been accustomed to run; that there was no difference in this respect between flood-water and an ordinary stream; that an action on the case would have lain at the suit of an individual for such diversion, and, consequently, that an indictment will lay where the act affected the public.

The jury found, that the acts creating the nuisance were done by the defendants severally:—*Held*, nevertheless, that, as the nuisance was the result of all those acts jointly, the defendants were rightly joined in one indictment, which stated the acts to have been several. *Rex v. Trafford*, 1 B. & Ad. 874. See *Trafford v. Rex*, (in error), 1 M. & Sc. 401; 8 Bing. 204; 2 C. & J. 265; 2 Tyr. 201.

3. Case for diversion of a water-course. 5th plea, That before the plaintiff was possessed, &c., the defendants made compensation to the then proprietor for the damage sustainable by diverting so much of the water as might be necessary for carrying on the G. C. Navigation; that after-

wards the defendants diverted, &c., as in the declaration mentioned, without this, that they diverted more water than was necessary for carrying on such navigation. 6th plea, That by an inquisition duly held, &c., the jury inquired and assessed what satisfaction they thought fit to award to every person, for such part of his lands as might be used or damaged in the progress of the then intended work of cutting a canal from C. to M., and what satisfaction should be made to the owner or occupier of any mill near any river intended to be made use of, for the damage which any person might sustain by the diversion of any part of the water of such river into the canal, for the purposes thereof; that the several sums so assessed and awarded were afterwards paid to the persons respectively entitled thereto; that the lands in question lay between C. & M., and that the said waters were then intended to be used by the defendants for the purposes aforesaid, and that the acts complained of were done in execution of the said work, and after payment of the sums so awarded. *Replication* to the 5th plea, traversing the making of compensation to the proprietor of the mills for the diversion. To the 6th plea, *precludi non*, because the mills were built before the inquisition, and were then in the possession of J. M., as tenant of the Duke of L.; that J. M., in respect of his possession, ought to have enjoyed the water; that he and the Duke of L. were respectively entitled to satisfaction for damages; and that no satisfaction was inquired of, assessed, or awarded to J. M., or the Duke of L., for the injury from the diversion:—*Held*, upon special demurrer to these replications—1. That the plaintiff having declared on his common-law right, need not in his pleading shew any title, possession

being sufficient against a wrong-doer. 2. And that he need not shew that the mill was built before the 1st of March, 1772, as required by a proviso in the 11 & 12 Geo. 3, c. 31, s. 16; nor that compensation had not been received in respect of them, but that the defendants, resisting the claim, ought to have shewn that the mill was subsequently built. 3. That the making of compensation was, under the above act, a condition precedent to the right of taking land or water. 4. That the replication traversing the compensation, and passing by the special traverse, was good, as such special traverse was on an immaterial point. 5. That the defendants, relying on the fact of compensation made, ought, by their plea, to have shewn to whom it was made, and therefore the 5th plea was bad. 6. That the 6th plea was bad also, in not averring notice of the inquisition to the then owner or occupier of the mill; and that a particular sum was paid in respect of it, and to whom. 7. That the action on the case well lay, rather than an action of debt for the sum awarded by the inquisition or a mandamus. *Tyrrell v. Grand Canal Company*, 1 Hayes & Jo. 558.

4. Three parties agreed that a canal or mill-lead should be made through their respective properties to propel machinery in works belonging to them, to be maintained at the expense of each, so far as it passed through his lands; but there was no express stipulation as to any right of access along the banks through their several properties:—*Held*, (reversing the judgment of the Court of Session), that the proprietor of the ground on which the road was formed, had a right to prevent the others from using it, except in the case of obstruction in the water of the mill-lead, or actual damage arising to their works. *Weir v. Glenny*, 7 Wils. & Sh. 244.

WAY.

See NAVIGATION.

NUISANCE.

PUBLIC.

TOWING PATH.

WATERCOURSE, 4.

WHARF.

See NAVIGATION, 12, 13.

RATING, 27, 46.

WILL.

See EXECUTORS.

Where a canal is situate in the provinces of Canterbury and York, but the office for transacting the business of the canal is in the former province, it is sufficient if the will of a shareholder be proved in the Prerogative Court of Canterbury. *Smith v. Stafford*, 2 Wil. Ch. R. 166.

WITNESS.

See EVIDENCE.

WORKS.

See ACCOUNTS, 2, 3.

ACTION, 9.

BANKRUPT, 6.

EVIDENCE, 6.

FISHERY.

MANDAMUS, 9.

MINES, 1, 3.

NUISANCE, 1, 4.

RATING, 13, 27, 32, 33, 41, 42, 44, 46.

(Equity).

1. Persons authorized by act of Parliament to cut a canal, and required to appropriate certain sums for the construction and maintenance of works to protect a harbour in which the canal was intended to terminate, not restrained from cutting through their own lands at a distance from the harbour, in the event of a present insufficiency of funds for the completion of the undertaking pending an

application to Parliament for further powers to levy money. Persons authorized by act of Parliament to cut a canal, if their funds are insufficient for the completion of the undertaking, may, on the prompt application of the owner of lands through which they are cutting, be restrained from proceeding. *Mayor &c. of King's Lynn v. Pemberton*, 1 Swan. 244, 250.

2. A Railway Company, in exercise of the powers conferred on them by an act of Parliament, which gave compensation to persons whose property might sustain damage from their operation, were proceeding to erect an arch over a mill-race for the purpose of sustaining an embankment on which the railway was to be constructed; and it appeared that injury would be done to the mill if the arch were of the proposed dimensions, but that the injury would be avoided if the arch were of certain larger dimensions, an injunction was granted to restrain the Company from making over the mill-race an arch of less than certain specific dimensions. *Coats v. Clarence Railway Company*, 1 Russ. & M. 181.

(Law).

3. On a covenant to build a bridge in a substantial manner, and to keep it in repair for a certain time, the party is bound to rebuild the bridge though broken down by an extraordinary flood. *Brecknock Navigation v. Pritchard*, 6 T. R. 750.

4. The Medway Navigation Company being empowered under a local act (16 & 17 Car. 2) to make the river navigable, and to take tolls; and "to amend or alter such bridges or highways as might hinder the passage or navigation, leaving them or others as convenient in their room," &c., and they having forty years ago destroyed a ford across the river in the common highway, by deepening its bed, and built a bridge over the same place, are

bound to keep such bridge in repair, as under a continuing condition to preserve the new passage in lieu of the old one, which they destroyed for their own benefit. *Rex v. The Inhabitants of the County of Kent*, 13 East, 220.

5. A Canal Company, authorized by an act of Parliament to make the river Bain navigable, and to make and enlarge certain navigable cuts, and build bridges and other works connected with the navigation, having for their own benefit made a navigable cut and deepened a ford which crossed the highway, and thereby rendered a bridge necessary for the passage of the public, which was accordingly built at the expense of the Company in the first instance, are bound to maintain the same; and the burthen of repair cannot be thrown upon the inhabitants of the (county) parts of Lindsey, in the county of Lincoln. The Company were found to have profitable funds for the purpose. *Rex v. The Inhabitants of Lindsey*, 14 East, 317.

6. Indictment charging an individual with the repair of a bridge, by reason of his being owner and proprietor of a certain navigation, is not equivalent to charging him *ratione tenuræ*, but is erroneous, and if judgment be given thereon, upon error brought, it will be reversed; it seems that a count charging him by reason of being owner of a navigation under a private act of Parliament must set forth the act. *Rex v. Kerrison*, 1 M. & S. 435.

7. Where certain persons and their

successors were authorized, by act of Parliament, to make a river navigable, and to cut the soil of any persons for making any new channel, &c., by virtue of which they cut through a highway, and rendered it impassable, and a bridge was built over the cut, over which the public passed, and which had been prepared by the proprietors of the navigation:—*Held*, that the proprietors, and not the county, were liable to repair. *Same v. Same*, 3 M. & S. 526.

8. By an act of Parliament a Canal Company were bound to repair the banks of the canal. In an action brought by the Company against the owner of adjoining land, for digging clay-pits upon his own land, and causing the plaintiffs' banks to give way, there was some evidence to shew that the bank was not in good repair: but the learned Judge directed the jury to find for the plaintiffs, if they thought that the falling in of the banks was caused by the defendant's having dug clay-pits:—*Held*, that the plaintiffs were not entitled to recover, unless at the time when the bank gave way it was in good repair, and, that question not having been submitted to the jury, a new trial was granted. *Staffordshire and Worcestershire Canal Company v. Hallen*, 6 B. & C. 317; 9 D. & R. 266.

YARD.

See CONSTRUCTION OF STATUTES, 1.

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EXPLANATION

OF

ABBREVIATIONS AND REFERENCES.

Abb. Ship.....	Abbott on Shipping.	M. & R.	Manning & Ryland.
A. & E.....	Adolphus & Ellis.	M. & S.....	Maule & Selwyn.
Affd.	Affirmed.	M. & Sc.	Moore & Scott.
Amb.	Ambler.	M. & W.	Meeson & Welsby.
B. & A.....	Barnewall & Alderson.	Moll.	Molloy.
B. & Ad.	Barnewall & Adolphus.	Mont.	Montagu.
B. & C.....	Barnewall & Cresswell.	My. & Cr.....	Myne & Craig.
B. & P.....	Bosanquet & Fuller.	My. & K.	Myne & Keen.
Beav.	Beavan.	N. & M.	Nevile & Manning.
Bing.	Bingham.	N. & P.....	Nevile & Perry.
Bing. N. C.	Bingham's New Cases.	P. & D.....	Perry & Davison.
Burr.	Burrow.	Russ.	Russell.
Camp.	Campbell.	Russ. & M.	Russell & Mylne.
Ch.	Chitty.	Russ. C. & M. ..	Russell on Crimes & Misdemeanors.
C. & M.....	Crompton & Meeson.	S. C.	Same Case.
C. M. & R.....	Crompton, Meeson & Roscoe.	S. & S.	Simon & Stuart.
C. & P.....	Carrington & Payne.	Shaw & Macd. ..	Shaw & Maclean.
Coop. Ch. Ca....	Cooper's Chancery Cases.	Sim.	Simons.
Cowp.	Cowper.	Stark.	Starkie.
Cr. & Ph.....	Craig & Phillips.	Swan.....	Swanston.
Dea. & Ch.	Deacon & Chitty,	T. R.	Term Reports—(Durnford & East).
Doug.	Douglas.	Tyr.	Tyrwhitt.
D. & R.....	Dowling & Ryland.	Ves.	Vesey.
Dowl.....	Dowling's Practice Reports.	Wils. & Sh.	Wilson & Shaw.
East, P. C.	East's Pleas of the Crown.	Wil. Ch. R.	Wilson's Chancery Reports.
Esp.	Espinasse.	Y. & C.....	Younge & Collyer.
Jac.	Jacob.	Y. & J.	Younge & Jervis.
Ld. Ken.	Lord Kenyon.		
Leach, C. C.....	Leach's Crown Cases.		
M. & M.	Moody & Malkin.		
Mood. & R.	Moody & Robinson.		

RAILWAY AND CANAL CASES.

COURT OF QUEEN'S BENCH.

In Hilary Term, 1842.

THE QUEEN v. THE LEICESTERSHIRE AND NORTHAMPTONSHIRE UNION CANAL COMPANY.

1842.

January 19.

A MANDAMUS issued, tested 17th June, 3rd Vict. (1840), to the Company of Proprietors of the Leicestershire and Northamptonshire Union Canal, incorporated under and by virtue of an act of Parliament, (33 Geo. 3, c. xcvi), reciting as follows, "that the said Company were, under and by virtue of the said act, authorized and empowered to make and maintain, in manner in the said act mentioned, a certain navigation and canal from the town

By a canal act, (33 Geo. 3, c. xcvi), the defendants were empowered to make a canal, to be called the Union Canal, from L. to N., with a cut from G. (a point in the line) to M. It being found impracticable to carry

the work to N., another act was passed (45 Geo. 3, c. lxxi), enabling them to vary the line of the cut from G. to M., which was done accordingly. A third act was afterwards passed (50 Geo. 3, c. cxxii), for joining the Union Canal to the Grand Junction Canal, by means of a canal from G., to be called the Grand Union Canal; which was also done.

By the act 33 Geo. 3, the defendants were authorized to receive for coal, navigated upon the Union Canal and cut, a mileage tonnage of 2½d., so as not to exceed a certain sum (5s.). By the 50 Geo. 3, it was enacted, that they should not be entitled to receive more than 2s. 6d. per ton for coal, navigated on the Union Canal, and thence on the Grand Union Canal for a certain specified distance (to H.); and 2s. 1d. if carried beyond that distance.

A mandamus issued, reciting that M. was aggrieved by the tonnage taken by the defendants on coal being higher from L. to M., by G., than if it were carried, after passing G., upon the Grand Union Canal; and commanding the defendants to establish a uniform rate of tolls along the whole of their line, or to take tonnage on coal from L. to M. only in proportion to that carried from L. to G., and afterwards upon the Grand Union Canal, so long as they took less than the 2s. 6d. and 2s. 1d. on coal carried from L. to G., and afterwards upon the Grand Union Canal. The return to the mandamus denied the demand and receipt of unequal tolls. A traverse to the return re-asserted these particulars.

Held, (on demurrer to the traverse), that the first act having authorized a mileage toll, and the last act prohibiting in certain cases more than a certain amount of gross toll, the power of making a uniform rate of toll was expressly taken away from the defendants.

And that the first act having imposed such mileage toll on coal on the whole line of the Union Canal and cut, and having only exempted it from such toll if it passes along the Grand Union Canal, the original toll still prevailed from L. to M. on the Union Canal.

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of Leicester to communicate with the river Nen, and proceed along the same to a certain point in or near the town of Northampton, and also a certain collateral cut from the said navigation, to or near the town of Market-Harborough. And that by a certain other act, (45 Geo. 3, c. lxxi) (a), the said Company were empowered to, and did vary and alter the collateral cut or canal from the said Union Canal to the town of Market-Harborough, in the manner in the said last-mentioned act mentioned. And that the Company of Proprietors of the Grand Union Canal, under and in pursuance of another act, (50 Geo. 3, c. cxxii (b)), caused to be made a certain other canal, called the Grand Union Canal.* And that the town of Market-Harborough was, amongst others, intended to be benefited by, and ought of right to have and enjoy the benefit of the said acts."

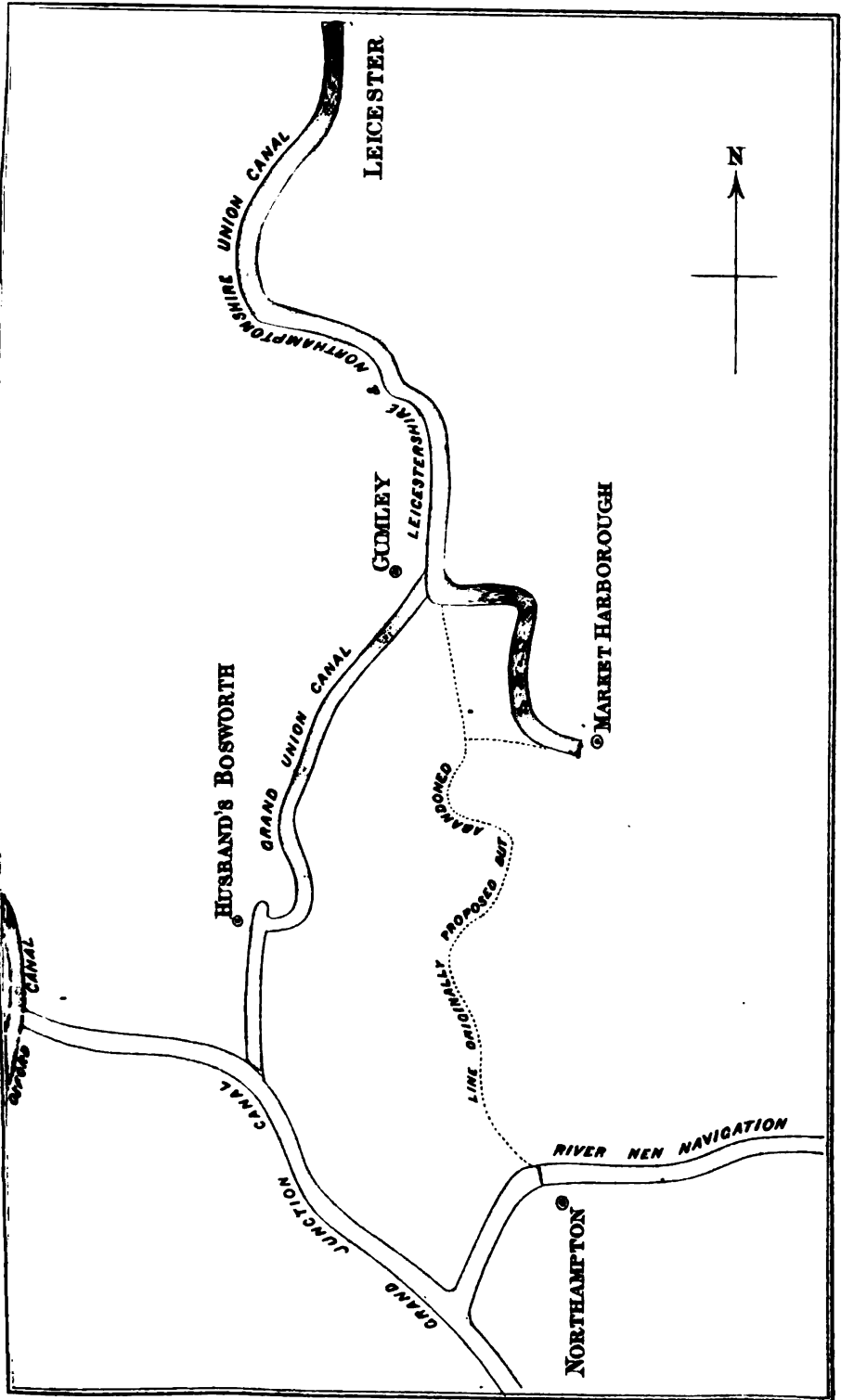
* See Plan.

" And that you the said Company have demanded and taken, and do demand &c., for the conveyance of coals and coke, navigated and conveyed upon the said navigation, canal, and cut, from Leicester to Market-Harborough, a distance of twenty-four miles, (that is to say, a distance of nineteen miles along the main line of the said navigation, from Leicester to Gumley, and of five miles along the said collateral cut, from Gumley to Market-Harborough), a certain rate or tonnage, to wit, of 4s. 4d. for every ton of coal or coke navigated and conveyed upon the said navigation and collateral cut, from Leicester to Market-Harborough; whereas during the same period you have demanded and taken, and still do &c., for the conveyance of coal and coke navigated and conveyed upon the said na-

(a) Intituled " An act to enable the Company of Proprietors of the Leicestershire and Northamptonshire Union Canal to vary the line of the said Canal, and to alter and amend the powers of the act passed for making the said Canal."

(b) Intituled "An act for making

and maintaining a navigable Canal from the Union Canal in the parish of Gumley, in the county of Leicester, to join the Grand Junction Canal near Long Buckby in the county of Northampton, and for making a collateral Cut from the new intended Canal."



vigation from Leicester to Gumley, a distance of nineteen miles, the rate or tonnage of only 9*d.* a ton, if it enters the Grand Union Canal, and proceeds by canal to London; or the rate or tonnage of 1*s.* 3*d.* a ton, if it enters the Grand Union Canal, and proceeds by canal only to Northampton, or to any place between Northampton and London: or that otherwise you have demanded and taken, and still &c., in the first instance, a higher rate of tonnage for coal and coke navigated and conveyed upon the said navigation from Leicester to Gumley, and then if it enters the Grand Union Canal, and proceeds by canal to London or Northampton, or any intermediate place, as the case may be, you allow a drawback from such higher tonnage, so as to reduce it to 9*d.* a ton, if the coal or coke proceeds by canal to London, or 1*s.* 3*d.* a ton if it proceeds by canal only to Northampton, or to any place between Northampton and London. And that by reason of such different and unequal rates of tonnage, the town of Market-Harborough, and the inhabitants thereof, have not enjoyed, and cannot enjoy the benefit of the said acts, and that the trade thereof in coal and coke hath been, and is, by reason of the premises, greatly deteriorated and diminished, to the great damage of the said town, and the inhabitants thereof. And that application on behalf of the said town, and divers of the inhabitants thereof, hath in due manner been made to you the said Company, to make and establish an uniform rate of tolls to be taken along the whole line of the said Union Canal, or to demand and take rates for the tonnage of all coals and coke carried and conveyed from Leicester to Market-Harborough, upon the said navigation and collateral cut, only equal in proportion to the rates which you may demand and take for the tonnage of coals and coke carried from Leicester to Gumley upon the said navigation, so long as the rate of tonnage taken and demanded by you is less than 2*s.* 6*d.* per ton, for any coal or coke to be navigated from the said Union Canal, unto

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and upon the said Grand Union Canal, to any distance beyond a certain tunnel made at or near Husband's Bosworth, and not exceeding eighteen miles upon the said Grand Union Canal; or 2s. 1d. per ton for any coal or coke navigated upon the said Union Canal, and from thence upon the said Grand Union Canal, a greater distance than eighteen miles : but that you the said Company have absolutely neglected and refused, and still do refuse so to do, to the great damage and grievance of the said town of Market-Harborough, and of the said inhabitants thereof, and to the manifest injury to their trade in coal, coke, and otherwise."

The mandatory part of the writ was as follows:—"We, &c., do command you, the said Company, that from the time of the receipt of this our writ, you do make and establish an uniform rate of tolls to be taken along the whole line of the said canal, or that you do demand and take rates, for the tonnage of all coals and coke which may be carried and conveyed upon the said navigation and collateral cut from Leicester to Market-Harborough, only equal in proportion to the rates which you may demand and take for the tonnage of coals and coke which may be carried and conveyed from Leicester to Gumley upon the said navigation, so long as the rate of tonnage which may be taken and demanded by you is less than 2s. 6d. per ton for coal or coke to be navigated from the said Union Canal into and upon the said Grand Union Canal, to any distance beyond the said tunnel made at or near Husband's Bosworth, and not exceeding 18 miles upon the said Grand Union Canal; and less than the sum of 2s. 1d. per ton for any coal or coke navigated upon the said Union Canal, and from thence upon the said Grand Union Canal, a greater distance than 18 miles : or that you shew us cause," &c.

Return, filed 20th Nov. 1840, stated that, by the 38 Geo. 3, c. xcvi, power was given to the Company (sect. 1) to make the canal, and (sect. 51) to raise by borrowing

or otherwise £200,000, and, if that were insufficient, £100,000 more, and to assign the navigation and works, and the rates to arise by virtue of that act, as a security for money to be borrowed, and to farm the rates, or any part thereof, upon the whole or any part of the navigation, for any time not exceeding fourteen years, with the same power to the lessees for collecting the same, as if they were appointed for that purpose by the Company. That by the said act (a), the Company were empowered (*inter alia*) to take 2½d. per ton per mile for all coal to be conveyed on the said navigation, so that the amount of such tonnage in the gross should not exceed 5s. per ton; and from time to time to lower or reduce the said rates, and again to raise the same, to such sums and as often as they should think proper. That by the act 45 Geo. 3, c. lxxi (b), the Company were empowered to vary the line of the said collateral cut. That in pursuance of the said acts, the canal was made from Leicester to Gumley, and the col-

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(a) The 33 Geo. 3, c. xcvi, recites, "That the making and maintaining the canal and collateral cut will open an easy and commodious communication between the towns of Market-Harborough and Northampton," &c., and enacts,

Sect. 67. "That it shall be lawful for the said Company of Proprietors from time to time, and at all times hereafter, to ask, demand, take, and recover, to and for their own proper use and behoof, the several rates hereinafter mentioned, for the tonnage and wharfage of all minerals, merchandize, and other goods, matters, and things whatsoever, which shall be carried or conveyed upon the said navigation, canal, or collateral cut, or any of them; that is to say, (*inter alia*),

"For all coal and coke, to be

navigated and conveyed upon the said navigation, canal, or collateral cut, the sum of 2½d. per ton per mile; so that to whatever extent the same shall be carried or conveyed, the amount of such tonnage, *in the gross*, shall not exceed the sum of 5s. per ton.—

"And the said Company of Proprietors shall have full power from time to time, at any general or special assembly, to lower or reduce all or any of the said rates, and again to raise the same, to such sums as they shall think proper, not exceeding the sums before mentioned, as often as it shall be deemed necessary for the interests of the undertaking."

(b) By the act, 45 Geo. 3, c. lxxi, all the powers of the former act as to tolls, &c. are continued.

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lateral cut from the canal at Gumley to Market-Harborough, but was not continued beyond Gumley towards the river Nen. That by the act 50 Geo. 3, c. 122, incorporating the Grand Union Canal Company, and reciting the impracticability of completing the line of the Leicestershire and Northamptonshire Union Canal to the river Nen, power was given to complete the Grand Union Canal from the Union Canal, to unite with the Grand Junction Canal. The return then set out certain sections (a) of that act, and then proceeded as follows:—

(a) 50 Geo. 3, c. cxxii, s. 66, enacts—"That it shall be lawful for the said Company of Proprietors from time to time, and at all times hereafter, to ask, demand, take, and recover, to and for their own proper use and behoof, the several rates hereinafter mentioned, for the tonnage of all minerals, merchandize, and other goods, matters and things whatsoever, which shall be carried or conveyed upon the said canal and collateral cut, or either of them, that is to say, (*inter alia*),

"For every ton of coal or coke which shall pass from the said Grand Junction Canal into the canal hereby authorized to be made, and be navigated or conveyed on such new canal, and not be carried further thereon than twelve miles, the sum of 2s. 6d.; and for every ton of such coal or coke which shall be navigated and conveyed more than twelve miles on such new canal, a further sum of 2½d. per mile, beyond the said twelve miles, in case such coal or coke shall not afterwards be navigated and conveyed upon the said Leicestershire and Northamptonshire Union Canal."

"For every ton of coal and coke which shall pass from the said Leicestershire and Northamptonshire Union Canal, and be navigated or conveyed into or upon the canal hereby authorized to be made, and not be carried further thereon than the distance of eighteen miles, the sum of 2s. 6d.; and for every ton of coal or coke which shall be navigated or conveyed more than eighteen miles upon or along such new canal a further sum of 2½d. per mile beyond the said eighteen miles, so as that the whole tonnage to be received by the Company of Proprietors thereby created shall not in such case exceed the gross sum of 2s. 11d. per ton.

"For every ton of coal and coke which shall pass from the said Leicestershire and Northamptonshire Union Canal into or upon the canal hereby authorized to be made, and shall afterwards pass into or upon the said Oxford Canal, the sum of 2s. 9d. over and above the said sum of 2s. 11d.; and the general committee of the said Company of Proprietors shall have full power from time to time to lower or reduce all or any of the rates hereby granted, and again to raise

"That the Grand Union Canal was opened in the year 1815, and that the sum of £160,000 and upwards was expended by the Union Canal Company in making the canal

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the same to such sums as they shall think proper, not exceeding the sums herein mentioned, as often as it shall be deemed necessary for the interests of the said navigation, except as hereinafter is mentioned."

Sect. 67 provides, "That the gross tonnage of 2s. 6d. shall be charged and received by the said Company of Proprietors hereby created, without power of abatement or refunding, (but with the consent of the committee of the said Company of Proprietors of the Leicestershire and Northamptonshire Union Canal), for and upon every ton of coal and coke which shall be navigated into or upon the said intended canal from and out of the said Leicestershire and Northamptonshire Union Canal."

Sect. 68 provides, "That the said gross tonnage of 2s. 9d. per ton on coal and coke which shall be navigated on the said intended canal, and afterwards pass into and upon the said Oxford Canal as aforesaid, shall not be lowered or reduced without the consent of the said Company of Proprietors of the said Oxford Canal, under their common seal, and then only in case of a proportionate reduction of tolls by the Oxford Canal."

Sect. 69 provides, "That in case the rates hereby granted for tonnage upon coal and coke, which shall pass from the said Grand Junction Canal into and be navigated upon the canal hereby authorized to be made, shall at any time or times hereafter be lowered or reduced, then and so often, and in

every such case, the rates hereby granted for tonnage upon coal and coke, which shall pass from the said Leicestershire and Northamptonshire Union Canal into and be navigated upon the said canal hereby authorized to be made, shall be lowered or reduced in the same proportion, except only in regard of such coal or coke as shall be navigated into and upon the said canal hereby authorized to be made from and out of the said Leicestershire and Northamptonshire Union Canal, and shall pass upon the said canal hereby authorized to be made for a less distance than seven miles."

Sect. 70 provides, "That from and immediately after a communication shall be made between the said intended canal and the said Grand Junction and the Leicestershire and Northamptonshire Union Canals, the said Company of Proprietors of the Leicestershire and Northamptonshire Union Canal, or any collector or collectors, or other person or persons acting under their authority, shall not ask or demand, or be entitled to receive, more than the sum of 2s. 6d. per ton for any coal or coke to be navigated from the said Leicestershire and Northamptonshire Union Canal into and upon the said intended canal, to any distance beyond a certain tunnel then intended to be made at or near Husband's Bosworth, and not exceeding eighteen miles upon the said intended canal; nor more than the sum of 2s. 1d. per ton for any coal or coke navigated upon the said Leicestershire and North-

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from Leicester to Gumley, and the collateral cut; and that from the completion of the said Union Canal hitherto, the dividends received by the proprietors have not amounted to £3 per cent. per annum on the capital stock."

The return then denied the allegations of the writ, stated the amount of traffic and tonnage actually received on the several canals, and that no application on behalf of the town or inhabitants of Market-Harborough had been made to the Company to establish such uniform or proportionate rate of tolls as in the writ surmised.

The prosecutor of the writ took issue upon those allegations in the return which denied that the Company had levied an unequal toll, and that application had been made to them to establish such uniform or proportionate rate of tolls.

General demurrer, and joinder in demurrer.

Manning, Serjt., in support of the demurrer (a).—1. The defendants are not bound, either by the 38 Geo. 3, or 45 Geo. 3, to make a uniform rate of tolls along the whole line of the canal, or to take rates for the tonnage of coal and coke conveyed from Leicester to Market-Harborough only equal in proportion to the rates taken on coal and coke

amptonshire Union Canal, and from thence upon the said intended canal a greater distance than eighteen miles."

And sect. 109 provides, "That the Grand Union Canal Company shall pay the Oxford Canal Company 2s. 9d. for every ton of coal or coke passing from the Leicestershire and Northamptonshire Union Canal into and upon the Grand Union Canal, and afterwards conveyed into or upon the said Oxford Canal, by half-yearly payments, &c.; and that in case the rates taken by the Oxford Canal Com-

pany shall not be equal to the rates authorized to be taken at certain wharfs on the Oxford Canal, and which might have been received in case the Grand Union Canal had not been made, the Grand Union Canal Company shall pay the deficiency, if a claim shall be made within three months, and, in case of any dispute as to the amount, the same shall be ascertained by a jury."

(a) Nov. 10, 1842. Before Lord Denman, C. J., Williams, Coleridge, and Wightman, Js.

conveyed from Leicester to Gumley, so long as the rate of tonnage taken by them is less than 2s. 6d., or 2s. 1d. per ton in the events mentioned in the writ.—2. Supposing that the Company were so bound under those acts, or either of them, they ceased to be so bound upon the passing of the 50 Geo. 3.—3. No ground is surmised in the writ for the introduction of the rates of 2s. 6d. and 2s. 1d.—4. The facts disclosed in the return, which are neither traversed nor avoided by the prosecutor, shew sufficient cause for not obeying the said writ. The *mandamus* requires an impossibility. It calls upon the Company either to make an equal rate of tonnage for the whole canal, which the 50 Geo. 3 says they shall not do, or that they shall demand rates for coal in one case only equal in proportion to those taken in another. But this cannot be done; they do not bear any proportion to each other, the one being a mileage, and the other a gross toll. The Court refused to interfere for this purpose in two cases similar in circumstances to this. *Rex v. The Grand Junction Canal Company (a)*, and *Rex v. The Glamorganshire Canal Company (b)*. The case of *The Attorney-General v. The Birmingham and Derby Junction Railway Company (c)* is exceedingly like this, with two remarkable distinctions; for in that case there was a clause in the act (3 Vict. c. li, s. 68) with a direct provision against favouritism, and no recognition, as here, of the principle of charging less with respect to the ultimate destination. The case of *Lees v. The Manchester and Ashton Canal Company (d)*, which was relied on in support of the application for the *mandamus*, does not apply to this. Lord Ellenborough, C. J., supposes it possible that the arrangement there proposed, of a partial diminution of or exemption from toll “would prejudice the security of proprietors and parties advancing money,” which could not occur here. This writ, therefore, has been improperly issued, and judgment must be for the defendants.

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(a) Post, p. 14.

(b) Post, p. 16.

(c) Antè, Vol. 2, p. 124.

(d) 11 East, 615.

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Peacock, contrà.—This return furnishes no answer to the *mandamus*. If the defendants choose to avail themselves of the power of reducing their tolls, they must do it equally to all persons, otherwise they injure individual towns by enabling others to undersell them. There is no power under 50 Geo. 3 to enable them to reduce the gross toll; they must therefore reduce under 33 Geo. 3, which is a mileage reduction, and would affect all the tolls. In *Rex v. The Trustees of the Bury and Stratton Roads* (a), Bayley, J., says, "It seems to me to be quite clear that the power to reduce the tolls is only to reduce them at all the different gates." That applies to this case. The cases cited by the other side as similar to this depended upon the particular acts of Parliament, not on general principles; and *The Attorney-General v. The Birmingham and Derby Junction Railway Company* (b) was in respect of carriages which other persons might put upon the line, that is, not a charge of toll, but as carriers. He also contended that the defendants, having put upon the record a return which the demurrer admits to be false, were precluded from availing themselves of the other matters appearing in the writ or in the return, and that the demurrer should have been to the writ; and he claimed costs, citing the 9 Ann. c. 20, *Green v. Pope* (c), and *Rex v. The Inhabitants of Wix* (d).

Manning, Serjt., relied upon the merits, the Court having overruled the other objection.

Cur. adv. vult.

LORD DENMAN, C. J., now delivered the judgment of the Court.—This case came before us on demurrer to a traverse of a return to a writ of *mandamus*. In order to make the question and subject intelligible, it will be necessary to advert shortly to the acts of Parliament that were passed, and the state of the canals made by virtue of them.

(a) 4 B. & C. 361.

(b) *Antè*, Vol. 2, p. 124.

(c) 1 Lord Raym. 125.

(d) 2 B. & Ad. 204.

It appears by the 33 Geo. 3 the defendants were empowered to make a canal from the town of Leicester to communicate with the river Nen in or near to the town of Northampton, and also to make a collateral cut from the same canal to the town of Market-Harborough.

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The work was proceeded with to a certain extent, but the project of carrying the canal to the river Nen was abandoned; and accordingly the 45 Geo. 3 passed, which enabled them to vary the line of the collateral cut to Harborough, and to make it from a place called Gumley in the writ mentioned. This cut having been completed, the 50 Geo. 3, for making a canal (the Grand Union) from the defendants' canal to join the Grand Junction Canal near Long Buckby in the county of Northampton, was passed; and a Company was formed for the purpose, called "The Company of Proprietors of the Grand Union Canal." This last-mentioned canal has been completed, and the proposed junction effected.

By the 33 Geo. 3, the defendants were authorized to receive for all coal and coke navigated on the said canal and collateral cut the sum of $2\frac{1}{2}d.$ per ton per mile, so as the whole charge per ton did not exceed a certain sum. By the second act (the 45 Geo. 3) the tolls are expressly left as they were under the former act, the line of the canal only having been altered thereby.

The tolls to be received by the Grand Union Canal were regulated by the 51 Geo. 3; it is not needful to refer more particularly to the amount they are thereby entitled to receive. The provision material for the purpose is that which regulated the amount of toll payable on coal and coke in respect of the passage along the defendants' canal from Leicester to Gumley aforesaid, if they proceed from that point along the Grand Union Canal. That provision, after a recital that the defendants were entitled to a mileage tonnage of $2\frac{1}{2}d.$, that the above-mentioned amount of such tonnage up to Gumley was $3s. 9d.$ per ton, and that the defendants' canal would be greatly benefited by the com-

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munication opened with the Grand Junction, and that, in consideration thereof, the defendants had agreed to reduce the toll on coal and coke which was to pass along the Grand Union Canal, enacts as follows: "that so soon as a communication between the defendants' canal and the Grand Junction Canal shall be made by means of the Grand Union Canal, the defendants shall not be entitled to receive more than 2*s.* 6*d.* per ton for coal and coke to be navigated from their canal on the Grand Union Canal for a certain specified distance; and 2*s.* 1*d.* if carried to a greater distance on the Grand Union Canal, any thing in the 33 Geo. 3 notwithstanding."

The writ recited the said act, and the making of the canal, and that the inhabitants of Harborough were aggrieved by reason of the coal and coke paying a higher toll from Leicester to Harborough by Gumley, than the same pay when carried along the Grand Union Canal from the said point of Gumley; and directed in the mandatory part that the defendants do make and establish a uniform rate of tolls to be taken along the whole line of the said canal, or demand and take rates for the tonnage of all coal and coke which may be carried on the said navigation or collateral cut or line from Leicester to Harborough, only equal in proportion to the rates they may take for the tonnage of coals and coke which may be carried from Leicester aforesaid to Gumley on the said navigation, so long as the rate of tonnage which may be taken by them is less than 2*s.* 6*d.* per ton for coal or coke to be navigated from the defendants' canal into and upon the said Grand Union Canal, to any distance beyond the said tunnel made at or near Husband's Bosworth, not exceeding 18 miles upon the said Grand Union Canal; and less than the sum of 2*s.* 1*d.* per ton for any coal or coke navigated on the defendants' canal, and from thence upon the Grand Union Canal, a greater distance than 18 miles.

The return sets out more at length the said act, and, among other parts, the clause above quoted, and denies

the demand and receipt of unequal tolls, and any application to the defendants to make a uniform rate. The traverse re-asserts the taking of a larger amount of toll for coal and coke along the Grand Union Canal, and also an application to the defendants to make a uniform rate.

To this traverse there is a demurrer, which proceeds upon the ground, that, supposing the facts stated by the prosecutor in his traverse to be admitted, enough appears in the return unanswered to prevent him from having the peremptory writ: and this depends on the construction of the first and last of the acts of Parliament above mentioned. For the decision of this question, we consider it to be wholly unnecessary to refer to the several cases cited in the argument, being clearly of opinion that it must depend on the circumstances of this particular case. We also think that, although the two governing acts are of great length, and the provision respecting tolls of considerable complexity, the question may be determined upon shorter grounds than are relied upon in the return, and also in the argument.

The first alternative in the mandatory part of the writ is disposed of by the clause in the latter act, which has already been set forth at length: for, whereas by the first act the tolls which the defendants were authorized to receive upon coal and coke were at the rate of $2\frac{1}{2}d.$ per ton per mile along their whole length of canal and collateral cut; after the latter act they are prohibited from taking more than a certain smaller amount in the shape of a gross toll for the passage of those articles from Leicester to Gumley, if they then diverge into the Grand Union Canal; but along the whole line from Leicester to Harborough the original mileage toll is still in force.

The power, therefore, of making one uniform rate of toll is expressly taken away from the defendants.

The second alternative in the mandatory part of the writ, although differently expressed, and in many words, does not, as we understand it, differ essentially from the

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first; for, if the tolls on coal and coke from Leicester to the common point, Gumley, were the same whatever be their ulterior destination, whether along the collateral cut to Harborough or along the Grand Union Canal, and the tolls on the same articles from Gumley to Harborough along that cut were also the same in proportion to the distance between the two latter places; that, it is presumed, would be a uniform rate of toll within the meaning of the first alternative. The same answer, therefore, is applicable, and to avoid repetition the case may be stated shortly thus:—By the first act a mileage toll is imposed on coal and coke on the whole length of the canal and collateral cut, but those articles are expressly exempted from that toll by the last act when they pass along the Grand Union Canal; whereas along the line from Leicester to Harborough the original toll prevails, and that, it appears, is higher in amount. Whether the interest of the parties was sufficiently consulted at the time of the passing of the latter act, and they are thereby injuriously affected, as is surmised in the writ, is a consideration into which we cannot enter; we must construe the acts as we find them, and the result is that our judgment must be for the defendants.

Judgment for the defendants (a).

(a) The following are the two cases cited in the argument, p. 9.

COURT OF QUEEN'S BENCH.

In Trinity Term, 1837.

1837.
 June 2.

THE KING v. THE GRAND JUNCTION CANAL COMPANY.

THE Grand Junction Canal Company were incorporated by 33 Geo. 3, c. lxxx (local and personal), by which they were empowered to charge three farthings a ton per mile for coal, and various other rates in respect of different articles. By subsequent acts additional tolls were given, some per mile and some in gross, giving together an aggregate tonnage of 9s. 7d. per ton on coal passing the whole distance to Paddington. By one of these acts, 52 Geo. 3, c. cxi (local and personal), intituled "An Act to explain, amend, and enlarge the Powers of certain Acts passed for making and maintaining the Grand Junction Canal," it was enacted

(sect. 67), "that it shall be lawful for the general committee for the time being of the said Company of Proprietors of the Grand Junction Canal, from time to time, to lower or reduce all or any part of the rates or tonnage granted by the therein recited acts, or any of them, and to raise the same again to such sums as they shall think proper, not exceeding the sums mentioned in the said acts, as often as they shall deem it necessary for the interest of the said navigation."

In 1831 the Company reduced the tonnage on coals delivered at Paddington to 3s., and made a considerable reduction on those delivered at intermediate places on the line. This reduction was made conditionally, and was to apply only to the coals coming from such of the two lines of canals forming the communication between the north end of the Grand Junction Canal, the one with the Derbyshire and Nottinghamshire, and the other with the Staffordshire and Warwickshire coal pits, as should reduce their respective rates 50 per cent. below their parliamentary rates. For a time the canals on both lines did so, and the coals from each passed at the reduced rate; but subsequently those on the line leading to the Staffordshire and Warwickshire pits raised their tonnages beyond the 50 per cent., and the Grand Junction therefore raised their tonnages to the full parliamentary rate in respect of the coals coming from that line of canal only, so that, whilst the latter coals were paying after the rate of 9s. 7d. per ton for passing along the Grand Union to Paddington, the coals from Derbyshire and Nottinghamshire paid only 3s. per ton, and a considerable disparity existed at the intermediate wharfs on the Grand Junction line. On the part of Mr. Finch, who was a coal proprietor in Staffordshire, in Michaelmas Term, 1834, Sir J. Campbell, Attorney-General, obtained a rule *nisi* for a *mandamus* to compel the Company to make an equal rate on all coals.

Sir F. Pollock and Wightman shewed cause.

Sir J. Campbell, Attorney-General, contra.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.—This was a motion for a writ of *mandamus* to compel the Company to make an equal rate on coals throughout the canal, under 33 Geo. 3, c. lxxx. The most material sections are the 67th and 74th. The former gives certain rates, and enables the Company from time to time to lower or reduce all or any of the said rates, and again to raise the same to such sums as they shall think proper, not exceeding the sums before mentioned, as often as it shall be deemed necessary for the interest of the said navigation. The 74th section gives "all persons free liberty to navigate the canal upon payment of such rates as shall be demanded by the said Company of Proprietors, not exceeding the sums hereinbefore mentioned." The case of *Rees v. The Trustees of Bury and Stratton Roads* (a) was cited in support of this motion, but there the act of Parliament contained direct provisions as to the same tolls being taken throughout the line of road.

(a) 4 B. & C. 361; 6 D. & R. 368.

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In this act, and the 35 Geo. 3, c. viii, and 52 Geo. 3, c. cxl, which extend the powers of this act, and which were referred to in argument, we find no such provisions, nor any thing which limits the discretion of the Company as to lowering or raising the rates, or any of them, in any manner. We think, therefore, that the rule must be discharged.

Rule discharged.

The following case was decided in the same term :—

COURT OF QUEEN'S BENCH.

In Trinity Term, 1837.

1837.
 June 9.

THE KING v. THE GLAMORGANSHIRE CANAL COMPANY.

THE facts of the case sufficiently appear in the judgment.

LORD DENMAN, C. J.—This was a motion for a writ of *mandamus* to compel a Canal Company, who had advanced the rates on certain goods carried on their canal, to advance them also on other goods proportionably. The question turns on the construction of the Canal Act, 30 Geo. 3, c. lxxxii, ss. 40, 45 and 46. The 40th section enables the Company to levy rates of different specified amounts on different goods. Sect. 45 enables them to lessen or reduce the said rates from time to time as they shall think proper, and afterwards from time to time to advance and raise all or any of the said rates so lessened, provided that such reduction shall be made in proportion upon all the said rates. The 46th section limits the profits to be received by the proprietors to 8 per cent., and enables the justices at sessions, under certain circumstances, to reduce the rates for the purpose of such limitation; provided that every reduction of the said rates shall be in the same proportion upon the different articles chargeable therewith. The Company from time to time reduced the rates on all articles to the aggregate amount of 75 per cent., prior to the year 1833. In the month of October in that year, they reduced the rates on all articles 10 per cent. more, and in the month of February 1834, they advanced the rates on some articles 35 per cent., on others 10 per cent., and on two articles, viz. iron and pitwood, they made no advance, but left them as reduced in October 1833, 85 per cent. It was objected that the Company had thus in effect made a disproportionate reduction, and that it was a mere evasion of the proviso in the 45th section for the Company to reduce in proportion, and immediately afterwards to advance out of proportion; and it was argued that, although the proviso in its terms extends only to reductions, it must, in order to effectuate the manifest intention of the legislature, be construed to apply to advances also.

We think that so to construe the proviso would be to do violence to the plain meaning of the words, and to reject some of the expressions used in the act, which we cannot feel ourselves at liberty to do. The rule, therefore, must be discharged.

Rule discharged.

COURT OF COMMON PLEAS.

*In Hilary Term, 1842.*PARKES v. THE GREAT WESTERN RAILWAY COMPANY. *January 29.*

DEBT for the price and value of work done for, and money due from the defendants. Plea, (except as to 4*l.* 10*s.*), 1. Never indebted. 2. Payment. 3. As to the 4*l.* 10*s.*, payment into Court. At the trial before *Tindal*, C. J., at the sittings at Guildhall, May 18, 1841, it appeared that the action was brought to recover the sum of 73*l.* 4*s.* 3*d.*, being the balance alleged to be due from the Company to the plaintiff, a contractor on the railway, in consequence of their not allowing the plaintiff the full sum agreed upon in two contracts made between him and the Company.

A Railway Company contracted with the plaintiff for the supply, at a certain price, of chalk stone for ballast, to be broken, carted, and stacked to the satisfaction of the Company's engineer, who was to have full power to stop the work at any time, upon giving due notice.

(No. 1).

"Articles of agreement for the supply of chalk stone for ballast, to be obtained at Hardwell, in the parish of Compton, Berks, by the undersigned, B. Parkes, who fully understands and agrees to abide by the following conditions:—

"1st. The Company to satisfy the owner for permission to take the material.

"2nd. The whole of the top soil, underwood, and trees to be removed, and put aside as useless, to the satisfaction of Mr. — the proprietor.

"3rd. The ballast to be excavated, broken in sizes fit

By a second contract between the same parties, the ballast was to be properly screened, also to the engineer's satisfaction, and an increased price was to be paid for it so screened.

In an action brought against the Company to recover the price of the work done at the increased rate, no evidence was

offered by the plaintiff of its having been screened to the satisfaction of the engineer, who, being called by the defendants, proved that it was not so. The learned Judge directed the jury, that as, by the contract, it was to be screened to his satisfaction, they should find for the defendants. The jury having found a verdict for the plaintiff, the Court granted a new trial.

But inasmuch as the verdict did not appear to be so perverse, as to be deliberately, with determination, against the Judge's direction, the rule was granted only on payment of the costs of the former trial.

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for a turnpike road, carted on to the line at the Kingston Road crossing, and stacked fit for measurement, at the rate of 3*s.* 5*d.* per yard; and should there not be required more than 3000 yards, then there shall be allowed 3*s.* 6*d.* per yard for the quantity delivered.

"4th. Not less than 300 yards to be delivered by the 20th of this month, and 700 yards for each week succeeding, so long as required.

"5th. The measurement for payment to be made every two weeks, and rest as usual with the Company's engineer, 10 per cent. being withheld, should the above quantities not be completed; and all damages that may be done to the adjoining lands, through which the material is to be carted, to be made good by the contractor, who is the responsible party, and the amount, if any, deducted from the last payment by the Company's engineer, to whose entire satisfaction the work is to be done, and who has full power to stop the work at any time, upon giving due notice to that effect in writing.

"Payment, subject to the above conditions, to be made in the first instance at the rate of 3*s.* 5*d.*, and the contract considered good, should a deficiency of fifty yards in the first week's supply be made up during the second.

(Signed) "J. S. TUCKER,

"BENJAMIN PARKES.

"Shrivenham, 13th June, 1840."

(No. 2).

"Compton Ballast.

"From the ballast at Compton turning out far inferior to that expected, and it being found necessary to screen a portion, in order to properly throw aside that not fit for ballast, it is agreed, with reference to the arrangement made between the Great Western Railway Company and Benjamin Parkes, that the ballast shall be properly screened, to the satisfaction of the Company's engineer,

and that an increased price of 8s. 9d. per yard for the ballast so screened shall be paid for the same, when carted to the line as before agreed, provided the quantity of 800 yards per week be delivered; if not, the old price and agreement of the 13th ultimo are again to come into force.

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(Signed) "J. S. TUCKER,

"B. PARKES.

"July 8, 1840.

"To come in force on the 10th instant.

"Two pence per yard, in addition to the above price, to be paid for each yard, over and above the forementioned quantity of 800 yards.

"J. S. T.,

"B. P."

The contract, and the work done under it, were proved, and evidence was given by both sides, as to the sufficiency of the materials. The plaintiff offered no evidence of the screening having been to the satisfaction of the Company's engineer; who, being called by the defendants, said it was not so, and that he had complained of it. His Lordship directed the jury that, as it was to be screened to his satisfaction, they should find for the defendants. The jury returned a verdict for the plaintiff; and *Bompas*, Serjt., in the term following, having obtained a rule *nisi* for a new trial,

Ludlow, Serjt., now shewed cause (*a*).—The simple question is, whether, there being evidence on both sides to go to the jury, they have necessarily drawn the wrong conclusion? This is an undertaking to pay a stipulated price for work: the undertaking on the part of the plaintiff is equivalent to a warranty, therefore the price may be reduced, if too much. The materials, however, were furnished by the Company; the complaints, such as they were, were caused by their inferiority—a fault for which the plaintiff was not answerable. By the second contract

(c) Before *Tindal*, C. J., *Coltman*, *Erskine*, and *Maule*, Js.

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it is stated, that the ballast was not so good as was expected. In consequence of that, the Company wished to have it screened to the satisfaction of their engineer, which must mean the reasonable, not fastidious satisfaction. The engineer had power at any time to stop the work, and that power never having been exercised, the jury had a right to take that into consideration as evidence against his dissatisfaction. Great expedition was to be used, and a stimulus was given of additional payment, if more than a certain number of yards should be delivered. For this the defendants have paid 4*l.* 10*s.* into Court. That is a strong fact to shew there was no reasonable ground of dissatisfaction, for, on no other ground than that the stipulated quantity was not delivered in a given time, were they to go back to the original price. No doubt there was evidence of complaint; but the engineer ought to have stopped the works, and, not having done so, it cannot be said to be such a gross perversion of justice as to make a new trial necessary.

Bompas, Serjt. (*Whately* was with him), contra.—The defendants contend that there was not evidence on both sides, and very little at all to support the plaintiff's case, and that the direction of the Judge was utterly disregarded, in which case it is right to grant a new trial. It is not denied, that the reference to the first contract in the second would give the engineer power to stop the works on non-delivery under the second. But the first does not allude to screening; for omitting which, therefore, the only penalty is the loss of the additional 4*l.*, but no power is given to stop the works. Therefore it is no evidence that the engineer was satisfied, that he did not stop the works. By express provision, the Company are only to pay for what is screened to his satisfaction. The evidence is, that as much was screened as wanted screening. That does not shew how much, for that may mean

none, in which case nothing would be paid. [*Maule, J.*—The engineer might have been dissatisfied with his screening too much, as well as too little.] And if it is shewn that a large part did not require it, that is conclusive. The question is, was any, and what done, to the *bond fide* satisfaction of the engineer? If not, the defendants have a right to object to the verdict. [*Erskine, J.*—Can you shew it to be a perverse verdict?] If a Judge lays down to a jury a rule by which they ought to be guided, and they disregard it; that is a perverse verdict. His Lordship told the jury, that if it was not screened to the satisfaction of the engineer, they should find for the defendants. If it is perverse as to part, they are entitled to a new trial. When persons choose to submit a thing to the satisfaction of a third party, that is obligatory on them, unless there be fraud. If he acts *bond fide*, they have no right to say it is not reasonable. Here there is no evidence whatever of the circumstances necessary to support the second contract. The payment of the 4l. 10s. into Court was made in order to avoid raising the question of that which is a distinct statement at the end of one of the contracts.

TINDAL, C. J.—This is a case in which the verdict ought to be reconsidered; the only question is, upon what terms. I should be very slow to apply the doctrine of perverse verdict, unless the case evidently required it; and I am not prepared to say that I told the jury so distinctly as to how the verdict should be, that I can say that they went deliberately with determination against the opinion of the Judge. The rule, therefore, will be absolute for a new trial, on payment of costs of the former trial.

Rule absolute.

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COURT OF QUEEN'S BENCH.

*Sittings after Hilary Term, 1842.**February 2.* THE QUEEN v. THE EASTERN COUNTIES RAILWAY CO.

By a railway act (6 & 7 W. 4, c. cvi, s. 9) a Company were empowered to raise or lower any roads or ways in order the more conveniently to carry the same over or under or by the side of the railway. By sect. 100, where any bridge should be erected by the Company over any public carriage road, not being a turnpike road, the centre of the arch must be of a height from the surface of the road of not less than 16 feet. By sect. 120, nothing in that act is to derogate from any of the rights or privileges of any parish over which the railway shall pass, acting under any local act.

MANDAMUS issued, tested 11th June, 4 Vict., 1841, reciting as follows: "Whereas in and by a certain act (7 Will. 4, c. cvi, s. 1), intituled, &c. certain persons were incorporated (a), &c. : and whereas by the said act it was amongst other things provided (sect. 100), "that when any bridge should be erected by the said Company for the purpose of carrying the said railway over or across any public carriage road, not being a turnpike road, the space of the arch of such bridge should be formed and at all times be and be continued of such width as to leave a clear and open space under every such arch of not less than eighteen feet, and of a height from the surface of such public carriage road to the centre of such arch of not less than sixteen feet, and the descent under any such bridge should not exceed one foot in twenty feet." And whereas, we have been informed, &c., that you, the said Eastern Counties Railway Company, did take upon yourselves the execution of the powers of the said act, and in pursuance thereof did begin to make, and have in part completed the said railway ; and that after the passing of

By a local paving act, (12 Geo. 3, c. xxxviii), it was enacted, "That no person shall alter the form of any pavements which shall be now made by virtue of this act, without the consent of the commissioners, or in any wise encroach thereon, or put up any posts, boards," &c.

Held,—That the Company were entitled, in carrying the railway by a bridge over a street under the control of the commissioners, to lower the street so as to give the height to the centre of the arch required by the statute.

Semble, that a *mandamus* should require some particular thing to be done to the bridge in such a case, and not, in general terms, that it "should be made conformably to the provisions of the act."

(a) *Antè*, Vol. 2, p. 260.

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the said act, to wit, on or about June, 1840, you did make and erect, or cause, &c. a certain bridge over and across a certain public carriage road, not being a turnpike road, called Brick Lane, situate in the several parishes of Christchurch, &c., for the purpose of carrying the said railway over and across the same, but that the span of the arch of the said bridge has been so formed by you that the clear and open space left under the said arch is of less height than sixteen feet from the surface of the public carriage road aforesaid to the centre of such arch, to wit, of the height of fifteen feet and one inch only, contrary to the provisions of the said act. And that application hath in due manner been made to you by and on behalf of the commissioners acting under and by virtue of a certain act (12 Geo. 3, c. xxxviii), for paving, regulating, &c. the squares, streets, and other public passages and places within the said parish of Christchurch, and also such parts of Brick Lane aforesaid as are not within the said parish, to alter or reconstruct the said bridge, so as to form the span of the arch of such bridge of a height from the surface of the public carriage road aforesaid to the centre of such arch of not less than sixteen feet, according to the provisions of the said act and your duty in that behalf; yet that you, well knowing the premises, and not regarding your duty in this behalf, have absolutely neglected and refused and still, &c. so to do, in contempt of us and of the provisions of the said act, to the great danger of the obstruction of the said public carriage road, and to the great damage and grievance of all our liege subjects there inhabiting and having occasion to use the same," &c.

The mandatory part of the writ was as follows: "We," &c. "do command you," &c. "that immediately after the receipt of this our writ you do make the said arch or bridge so by you erected as aforesaid, for the purpose of carrying the said railway over and across the said public carriage road, called Brick Lane, in &c., conformably to the provi-

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sions of the said act (7 Will. 4, c. cvi) for making the said railway as aforesaid; or that you shew us cause," &c.

Return, filed November 2, 1841, by the Eastern Counties Railway Company, recited sect. 9 of the 6 & 7 Will. 4, c. cvi (a), and then proceeded as follows:—

(a) Sect. 9. "That for the purpose and subject to the provisions and restrictions of this act, it shall be lawful for the said Company, their agents and workmen, and all other persons by them authorized, and they are hereby empowered to enter into and upon the lands of any person or corporation whatsoever, and to survey and take levels of the same, or any part thereof, and to set out and appropriate for the purposes of this act such parts thereof as they are by this act empowered to take or use, and in or upon such lands, or any lands adjoining thereto, to bore, dig, cut, and embank and sough, and to remove or lay, and also to use, work, and manufacture any earth, stones, trees, gravel or sand, or any other materials or things which may be dug or obtained therein, or otherwise, in the execution of any of the powers of this act, and which may be proper or necessary for making, maintaining, altering, repairing, or using the said railway and other works by this act authorized, or which may obstruct the making, maintaining, altering, repairing, or using the same respectively, according to the full and true intent and meaning of this act; and also to make and construct upon, across, under, or over the said railway, or other works, or any lands, hills, valleys, streets, roads, railroads, or tramroads,

rivers, canals, brooks, streams, or other waters, such inclined planes, tunnels, embankments, aqueducts, bridges (whether temporary or permanent), roads, ways, passages, conduits, drains, piers, arches, and fences, and also to erect and construct such houses, wharfs, warehouses, tollhouses, landing-places, engines, and other buildings, machinery, and other conveniences and works of all descriptions as the said Company shall think proper; and also to alter the course of any rivers, canals, brooks, streams, or watercourses, for such time as may be judged necessary by the said Company for constructing and maintaining any of the works aforesaid; and also to divert or alter the course of any rivers or streams of water, roads, or ways, or to raise or lower any such rivers or streams, roads or ways, *in order the more conveniently to carry the same over or under or by the side of the said railway*, and to make drains or conduits into, through, or under any lands adjoining or near to the said railway, except houses or buildings, for the purpose of conveying water from or to the said railway, and also from time to time to alter, repair, or discontinue the aforesaid works, or any of them, and to substitute others in their stead, and generally to do and execute all other matters and things necessary or con-

"And we do further humbly certify and return, that the said bridge in the writ mentioned was made and erected by us, for the purpose of carrying the railway over the said road, called Brick Lane, pursuant to the first-mentioned act; that the road, at the time of making the bridge, was and thence &c., and still is a paved road, and that the pavements of the said road, before and at the times aforesaid, were and still are vested in the said commissioners in the said writ mentioned, under and by virtue of the said act; and that the control and management of the said pavements was and is vested in the said commissioners. That the original plan adopted by us for making and erecting the said bridge, was to make and erect the same as it now is, and to lower the road under the said

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venient for constructing, maintaining, altering, or repairing, and using the said railway and other works by this act authorized, they, the said Company, their agents and workmen, doing as little damage as may be in the execution of the several powers to, them hereby granted, and the said Company making full satisfaction, in manner hereinafter mentioned, to all persons and corporations interested in any lands which shall be taken, used, or injured, for all damages by them sustained in or by reason of the execution of all or any of the powers hereby granted; and this act shall be sufficient to indemnify the said Company, and all other persons, for what they or any of them shall do by virtue of the powers hereby granted, subject, nevertheless, to such provisions and restrictions as are hereinafter mentioned and contained; provided that all works which may be done by the said Company relating to the drainage of the said railway

and lands, shall be subject to the regulations of the commissioners of sewers within whose limits such railway and lands shall be situate: Provided also, that nothing herein contained shall authorize or empower the said Company to alter or divert the course of the river Lea, or of any rivers, brooks, streams, or watercourses within the parish of Westham, in the county of Essex, or of the river Wenson, otherwise called the Yare, in the county of Norfolk, &c., or any rivers, brooks, or streams running into the said last-mentioned river."

Sect. 120 provides, "that nothing in this act contained shall extend to prejudice, derogate, or diminish any of the rights and privileges of any parish over which the said railway shall pass, acting under and by virtue of any local act or acts of Parliament, but that the same shall be in as full force and effect as if this act had not been made."

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bridge, so that the descent under the same should not exceed 1 foot in 20 feet, and so as to leave a clear and open space under the arch of the said bridge of not less than 18 feet, and of a height from the surface of the said road to the centre of such arch of full 16 feet, according to the provisions of the first-mentioned act. That such plan was carefully examined and considered by us before the adoption of the same; and that it appeared to us to be in every respect the most desirable plan that could be devised for making and erecting the bridge, regard being had to the nature and situation of the road over which the bridge is carried, and to the line of the railway. That the due and proper construction of the works of the railway rendered it necessary that the bridge should be made and erected as it now is, and at its present elevation, and that if the same had been made and erected at any greater elevation, an ascent would have been thereby caused on the line of the railway, when the same passes over Brick Lane, and the level of the line would have been thereby destroyed, and the engines and carriages used on the railway could not safely have passed along and over the bridge. And that we have always been and still are ready and willing to make the said arch or bridge conformably to the provisions of the said act in the said writ first mentioned. And we, the said Company, before the issuing of the said writ, were about to do and perform the said works, and to lower the road, according to the provisions in all respects of the said act, and to make that arch or bridge conformably to the said provision; but the said commissioners then and there refused to permit us so to do; and have thence continually hindered and prevented us, and still &c., from lowering the said road, and performing the said works, and making the span of the arch of such bridge of a height, from the surface of the road to the centre of the arch, of not less than 16 feet, according to the provisions of the said last-mentioned act as aforesaid. Wherefore, and for no other cause whatsoever, we have been and still are

hindered and prevented from making, and have not made the said arch or bridge, so by us erected for the purpose of carrying the railway over and across the said public carriage road, called Brick Lane, conformably to the provisions of the said last-mentioned act of Parliament, as by the said writ we are commanded," &c.

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A *conciliam* having been obtained—

Warren (Sir *F. Pollock*, Attorney-General, with him) moved to quash the return (*a*). The case resolves itself into two points. 1st. Whether the Company has any power to lower the road in any case, except with the consent of the commissioners. 2nd. Having once erected this arch, whether they are not concluded; that is, they ought to elect at a proper time, whether they will obtain the requisite height by lowering the road, or building the bridge at that height in the first instance.

1. The powers given by the 9th section of the Railway Act, are "subject to the provisions and restrictions of that act." By referring to section 120, one of them appears to be the express reservation of the rights of all parishes, acting under and by virtue of local acts. The parish of Christchurch, in question here, is governed by a local act, (12 Geo. 3, c. xxxviii). By section 12, the commissioners may cause the streets to be new paved or repaved. By section 14, no one can alter the form of such pavements, without the consent of the commissioners, in whom, by section 30, the property of the pavements is vested, and who have power, by section 32, to remove all nuisances and obstructions. Then, by the Metropolitan Paving Act, (57 Geo. 3, c. 29, s. 53), still more exclusive powers are given to the commissioners. Section 72 empowers them to prevent encroachments and obstructions; and, by section 138, that act is not to repeal any local paving acts. So that it is the right and duty of the commissioners to see the pave-

(*a*) January 22, before Lord *Denman*, C. J., *Patteson*, *Williams*, and *Coleridge*, J.

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ment is not taken up without their consent first obtained. The defendants contend that their right to lower the street is paramount to the right of the commissioners under their local act. But their own act (section 9) expressly says, that their rights are subject to such restrictions; and the word "conveniently" in that section must, according to the case of *Regina v. Sharpe (a)*, be construed to mean conveniently to the public, as well as to the Company.

2. Assuming, however, that they may disregard the saving clause above mentioned, they should at least have elected at the proper time in what way they would effect their object. And all they have to do now is simply to substitute an iron bridge for stone, that would do all that is required by this *mandamus*, and would be manifestly more convenient for the public, and would not have the effect of neutralizing the rights specially reserved by the 9th section, which was evidently inserted for the sake of lulling the opposition which they would otherwise have encountered to the passing of their act.

Butt (Sir *W. Follett*, Solicitor-General, with him) contra. —The question will turn on the 9th and 100th sections of the railway act only. The clauses of the paving act, though no doubt they save the jurisdiction of the commissioners as to the streets, are immaterial to this case. Section 9 is the only one that gives power to make bridges, the road under which (according to s. 100) is not to descend more than one foot in twenty. The Company, therefore, must have the power to do this, or their act is perfectly nugatory. They are to make the railway on a level, and if such opposition as this of the commissioners is to succeed, they could make no bridge at all, except in places where the road would from its nature enable them to make it of the requisite height. The *mandamus* does not call upon the Company to ask the consent of the commissioners; they do not pretend that the act has been contra-

(a) See note at the end of this case.

vened, or that the Company has not been ready and willing to carry out its provisions. The defendants concede that the pavements are vested in the commissioners, who will have the same jurisdiction as they had before; all that jurisdiction will attach to the substituted road, being saved by section 120; but that is not to prevent the Company from lowering the road, so as they do not inconvenience the public.

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Warren, in reply.—The Company in the first instance should have looked at the street in question, and considered all vested and other rights, and taken the level of their railway accordingly, to avoid interfering with those rights. In *Manser v. The Northern and Eastern Railway Company* (a) the Lord Chancellor says, "I will assume that the Company have a right to adopt any level which they please; but then they cannot do that capriciously." But they return here that they originally conceived a certain plan of operations which, it is contended, they ought not to have conceived. In *Aldred v. The North Midland Railway Company* (b), the same difficulty arose. There the commissioners of a road gave a qualified assent, which prevented the Railway Company from lowering the surface of the road, but they omitted to have such a clause inserted in the act, which passed without it, and neglected to procure from the applicants for the bill an agreement for such proviso. The Vice-Chancellor there said, "I am quite willing to admit that if there had been an agreement made on behalf of the Railway Company, that they would not have an act, other than that which should contain such a clause, or would take care, whatever the act might be, to build their bridge in a particular manner, this Court would hold them bound by that agreement; but this case is totally devoid of any such circumstances." The commissioners in this case could have asked for no

(a) *Antè*, Vol. 2, p. 380.

(b) *Antè*, Vol. 1, p. 404.

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agreement, for their rights are protected, and if the provisions for such rights are to be disregarded, it is useless to reserve them.

Lord DENMAN, C. J.—We will consider the effect of the various sections. I do not much like the form of this *mandamus*; it does not require any thing particular to be done, but only to make the bridge conformably to the act. The mandatory part of the writ would have been much better if it had told the Company what was required.

Cur. adv. vult.

COLERIDGE, J., now delivered the judgment of the Court:—In this case the question, raised in argument upon the return to a *mandamus*, was whether the defendants were at liberty to procure a certain required height, from the centre of an arch to the surface of the street under, by lowering the pavement of the street; or could be compelled to procure it by raising the level of the railway which passed over the arch, or in any other way. The defendants contended for the former; the prosecutors, who are the commissioners for paving Christchurch, the latter.

This question was admitted to turn on the construction of the 9th section of 6 & 7 Will. 4, c. cvi, taken in connection with the 120th section of the same act, and one of the clauses of the 12 Geo. 3, c. 38,—a statute under which the commissioners were appointed and enjoy certain rights, and exercise certain powers in the parish of Christchurch, in which the street in question is situate.

The 9th section above mentioned is the one usually found in acts of this description, and gives the Company very large, but necessary powers for constructing the railway, and, amongst others, the power “to raise or lower any rivers or streams, roads or ways, in order the more conveniently to carry the same over, or under, or by the side of the rail-

way." It has been found necessary to carry the railway on an arch over this street, and, the street not being a turn-pike road, the 100th section requires that there must be a height from its surface to the centre of the arch of not less than 16 feet, and that the descent under the arch shall not exceed 1 foot in 20. The commissioners do not dispute the right to carry the railway on the arch, nor is it alleged that the proposed lowering of the pavement would make the descent more than 1 foot in 20; but they deny the right to alter, or in any the slightest degree to meddle with the pavement. If the question stood on the two clauses alone, there could be no doubt. The 9th, in express terms, contemplates the lowering of roads, and the 100th, when it limits the steepness of descent under an arch, clearly looks to alteration of level to be produced by the railway works: if there were a natural descent, of any conceivable steepness, under an arch erected by the Company, they would not be bound to reduce it to the limits prescribed by the section. But it is said that the powers of the 9th section are expressly given "subject to the provisions and restrictions of the act;" and that one of the provisions included in the general words is to be found in the 120th section, which provides "that nothing in the act shall extend to prejudice, derogate, or diminish any of the rights or privileges of any parish over which the railway shall pass, acting under and by virtue of any local act." The parish of Christchurch is then said to be within these words,—because the paving, cleansing, lighting, &c., and regulating of the squares and streets in it are by a local act (the 12 Geo. 3, before mentioned) placed under the control of commissioners in whom the pavements are vested. The same statute enacts, "that no person shall alter or cause to be altered the form of any pavement which shall be now made by virtue of this act without the consent of the commissioners, or in anywise encroach thereon." If this had been the whole of the section, it would have been

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very questionable whether it could have been construed, so as to restrain the Company from exercising powers, plainly given under an act so long posterior in point of time, and which in many instances are so essential to the carrying out the purposes of their act. It would also be very questionable whether a local act, such as the one in question, comes within the meaning of the 120th section of the Railway Act. That section saves the rights and privileges of any parish acting under any local act; words which seem not very applicable to the case of the paving and lighting of a parish being placed under the management of commissioners. This section indeed follows as a proviso on a section which gives a mode for indemnifying parishes as to their poor and other rates, where they would be otherwise diminished by the rendering houses and other property unrateable during the construction of the railway; and it seems rather intended to save the peculiar rights which the local act might have given to particular parishes as to the modes of assessment and collection.

But without deciding the question on these suppositions, it seems to us that the point is clear when the whole of the section of the 12 Geo. 3 is looked at. After the words already cited on which the prosecutors rely, these immediately follow: "or put up any post or posts, step or steps, or erect any bulks or stalls, or place out any show glasses, or show boards, or make any dungholes, or sawpits, or other matters or things so as to be an encroachment, upon pain of forfeiting for every such offence any sum not exceeding £5 nor less than 40s. over and above the expenses of relaying and reinstating such pavement," &c. It is clear, then, that this section was inserted merely as a police regulation, to prevent what are commonly called street nuisances and encroachments, and the words "form of the pavement" are well suited for such a purpose. To lower the street and relay the pavement in the same form and of the same dimensions, but on a different level, is scarcely to "alter

the form of the pavement," and we should be straining the words beyond their natural meaning to include a case never contemplated by the legislature, if we were to give them the force contended for by the prosecutors.

Their counsel also relied on a section in the same act which vests the property of the pavements in the commissioners, but this appears to us immaterial. The Company, by what they propose to do, will not interfere with the property, which must of course in every case be in some person or body, and the act which incorporates them expressly authorizes them to lower roads. Upon the whole, therefore, we think the return to the *mandamus* sufficient, and that our judgment must be for the defendants.

Judgment for the defendants (*a*).

(*a*) The following is the case cited in the argument, *antè*, p. 28.

COURT OF QUEEN'S BENCH.

In Trinity Term, 1840.

THE QUEEN *v.* SHARPE.

INDICTMENT against the defendant for obstructing a highway. Plea —Not Guilty.—At the trial before *Alderson, B.*, at the Lancaster Spring Assizes, 1839, it appeared that the Lancaster and Preston Railway Company (whose engineer the defendant was), in prosecuting their works, were obliged to cross the turnpike-road from Lancaster to Garstang, and for that purpose to erect a skew bridge, so as not to be at too great an angle with the turnpike road. The act under which the Company were incorporated (7 Will. 4, c. xxii) enabled them (s. 29) to divert or alter roads, &c., in order the more conveniently to carry the same over, under, or by the side of the said railway, &c.; and sect. 34 provided, that where the railway should cross any turnpike-road, it should be by a bridge, the span of the arch of which, by sect. 40, was required to be of such width as to leave a clear space of 25 feet under the arch, and of the height, from the surface of the road to the centre of such arch, of 16 feet, and that the descent under any such bridge of such turnpike-road should not exceed one foot in 30 feet. The bridge in question was of the prescribed width and height, and the turnpike-road had been diverted a little, so as

which was the angle made at that particular point by the old line of road.

At the trial of an indictment against the Company's engineer for so doing, the learned Judge directed the jury, that, if the public sustained inconvenience by the alteration, they should find for the Crown; but that, if the work was done in a mode in which an experienced engineer would do it, having reasonable regard to the interests both of the Company and the public, the Company had a right to make such diversion. The jury having found for the defendant on the ruling, the Court refused to grant a new trial.

Seemle, that *conveniently* means conveniently both for the Company and the public.

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By a railway act, (7 Will. 4, c. xxii, s. 29), a Company were empowered "to divert or alter any roads or ways, in order the more conveniently to carry the same over or under the railway."

The Company in carrying a road under the railway had erected a skew bridge, which diverted the road to an angle of 45°, instead of 34°.

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to make an angle with the bridge of not less than 45°. The question was whether the new direction of the road was such as to render it less safe and convenient than before.

Witnesses were called on the part of the prosecution to prove that the bridge might have been erected at an angle of 34°, in which case there would have been no necessity to deviate from the old line of road, and that the deviation was in a curve which made it more difficult for passengers to see persons coming in an opposite direction.

Witnesses were also called for the defendants, to shew that it would not be proper to construct a bridge of so great elevation and span at a smaller angle with the road than 45°, and that, in point of fact, no inconvenience had been sustained by passengers in consequence of the diversion.

Alderson, B. (having consulted *Parke*, B. (a)) directed the jury that, as the only way for the Company to resist the charge was to shew that the bridge complained of had been built in conformity with the act of Parliament, the question in substance was, what was the most proper way to construe it. The word "conveniently" meant more conveniently upon the whole for carrying into effect the purposes of the act; and if the work was done in a mode in which an experienced engineer would construct it, having reasonable regard to the interests both of the Company and the public in the construction of it, it was to be looked upon as being in conformity with the intention of the act.

That it was therefore for the jury to say whether there was any practical inconvenience arising to the public by the road being diverted more obliquely than before, that is, at an angle of 45° instead of 34°. If the public would sustain such inconvenience, then, as it was clear that the bridge could be so made, and no convenience was added to the public by its not being so made, the verdict should be for the Crown. But if they thought that no material practical inconvenience was sustained by the public in having the present bridge, instead of the other of 34°, as it would be across the original road, and that an experienced engineer would have so constructed it, having regard to the interest both of the public and the Company, they had a right to make such a diversion in building the bridge, and the verdict should be for the defendant; in which case leave should be given to move to enter a verdict for the Crown, if the Court of Queen's Bench should think that the bridge ought to have been built across the road at an angle of 34°, without any diversion, be-

(a) *Parke*, B., said that, in a case which had been tried before him as to the power which a Company had to make a railway over a public highway, he laid it down, that, "if possible, the work must be constructed without any inconvenience to the public; but if it could not be done without some such inconvenience, it must be done with the least possible, according to the provisions mentioned in

the act." This was the case of *Reg. v. The London and Southampton Railway Co.*, tried at the Hants Summer Assizes, 1838, in which his Lordship held that mere *expense* was no reason for not making a road over the cutting as convenient as before. The indictment, however, was so bad on the face of it that no conviction was obtained.

cause it was clear that the bridge could so be made, and no convenience was added to the public by its not being so made.

The jury returned a verdict for the defendants; and *R. Alexander*, in the following term, having obtained a rule *nisi*, according to the leave given,

Cresswell and *Baines* now shewed cause (a).—The question is, whether the Company had a right, under the act, to make the road as they have done. The jury were asked whether the public had sustained any practical inconvenience, and whether the bridge was properly constructed, regard being had to the convenience of the public and the Company. The jury found that no damage had been sustained by the public. By sect. 29, bridges are to be of a certain width. There was only one other plan of building this over the diverted road, viz. by a skew bridge of 34° instead of 45°, which would have been a greater nuisance. In the case of *The Attorney-General v. The London and Southampton Railway Company* (b), the Vice-Chancellor decided that the defendants were not bound to make the bridge more than 15 feet wide, though it was practicable to do so, and would have been more convenient for the public.

R. Alexander and *Starkie*, contra.—The question is, whether in law this was a nuisance, and was not for the jury, but on the construction of the act. Their verdict, that it was not inconvenient, would not make it no nuisance. [*Littledale, J.*—How can we say it is a nuisance, if the jury find it is not so? Can we say from the Judge's report that it was? *Patteson, J.*—All that is reserved for us is, to say whether the defendants are obliged to carry on the road at the old angle, supposing both lines equally practically convenient.] *Parke, B.*, thought that the convenience of the public was to be consulted, as well as that of the Company, and it must be inconvenient to make two turns necessary instead of one. The word "practical" is not a correct term to apply. Any inconvenience would be a nuisance at common law (c). It may be an injury, because it is illegal, as in the case of an arrest by an officer, though no actual injury is suffered. There must have been some inconvenience here, and for this no cause is given but the saving of expense, which is admitted now to be no reason or justification. *Rev v. Morris* (d) is an authority that the way must be as convenient as the former way.

Lord DENMAN, C. J.—When I tried a case in which a road was narrowed (e), I told the jury it must be inconvenient; but in this case I could not lay down a different rule than that stated by the learned Judge. It is impossible that a verdict should be entered for the Crown. In the case of obstruction of light, we leave it to the jury whether any real inconvenience is sustained, though some light may demonstrably have been obscured. The complaint here, if any, is that the verdict is against evidence, for which we cannot grant a new trial.

Rule discharged.

(a) Before *Lord Denman, C. J.*, *Littledale, Patteson, and Williams, Js.*

(b) *Anté*, Vol. 1, p. 283.

(c) *Hawk. P. C.* p. 404.

(d) 1 B. & Ad. 441.

(e) *Reg. v. The London and Birmingham Railway Co.*, *anté*, Vol. 1, p. 325.

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IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

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Feb. 17. T. & S. FORSTER v. WALKER.

ERROR, on a judgment in the Queen's Bench.—This Case by a reversioner against a Railway Company for entering and making a railway on his land.

Plea, that, before the reversion of the plaintiff, the dean and chapter of Durham were seised in fee, and by indenture between them and the plaintiff demised to the plaintiff the lands in question for a term, "excepting and reserving the mines under the same, with power to dig, win, and carry away the said mines, with free ingress, egress, and regress, way-leave and passage to and from the same, or to or from any other mines, lands, and grounds, on foot and on horse-back, and with carts and all manner of carriages, and also all necessary and convenient passages, conveniences, privileges, and powers whatsoever, for the purposes aforesaid, and particularly of laying, making, and granting waggon ways in and over the last-mentioned premises, or any part thereof." The plea then justified the making the railway by the defendants, as the servants of the dean and chapter, and by their authority.

Replication, admitting the seisin in fee of the dean and chapter, and the demise to the plaintiff, and that he had no other title except under such demise,—*de injuriâ* &c., on which issue was joined.

On the trial, it appeared that the Railway Company had made a double line of railway on the plaintiff's land, under a deed executed by the dean and chapter, authorizing the Company to make such a railway for the conveyance of *passengers, coals, goods, wares, and merchandize*. The railway was constructed for the purpose of conveying general goods and passengers as well as coals, but had not been actually so used, and the railway was not more than was necessary for the carriage of the coals likely to be sent along it from the part of the county with which it communicated.

The learned Judge directed the jury that, if they thought the railway was made for other purposes *as well as* for the carriage of coals, the plaintiff was entitled to the verdict.

Held, that if the railway was such a railway as the Company, at the time when it was made, might lawfully make for the purposes for which, when made, they might lawfully use it, the plaintiff, as reversioner, had no ground of complaint by reason of the intention of the Company to use it also for other purposes for which they had no right to use it, and that the direction of the Judge was wrong.

That the proper question for the jury was, not whether the railway was made for other purposes as well as for the carriage of coals and minerals, but whether, at the time when the road was made, it had become necessary or expedient for the Company to make a road for the purpose of getting the excepted mines, and if so, whether the road actually made was a proper road for that purpose, assuming that it would be used for no other object.

That the only right reserved to the dean and chapter under the above clause in the indenture of demise by them to the plaintiff was that of making and granting the right of making ways over the demised lands for the purpose of getting the excepted woods, mines and minerals.

That the right possessed by the dean and chapter under the clause as lessors, was not the subject of an exception, as it was no parcel of the thing granted; nor of a reservation, as it did not issue out of the thing granted; but that it was an easement newly created by way of grant from the lessee. And that it was to be presumed that the deed was executed by both parties, lessee as well as lessors.

the Durham and Sunderland Railway Company, and their engineers. In the declaration, Walker (the plaintiff below) stated that certain lands, situate at Pittington, in the county of Durham, were in the possession of certain tenants thereof to the plaintiff, the reversion thereof then and still belonging to the plaintiff; yet the defendants wrongfully and injuriously intending, &c., whilst the said lands were so in possession of the tenants thereof to the plaintiff, and whilst he was so interested therein, to wit, on 1st July, 1836, and on divers &c., wrongfully and injuriously, and without the leave or license of the said plaintiff, by themselves, their servants, and agents, entered the said lands, and dug, excavated, &c.

Pleas—1st, Not guilty; 2nd, That the lands were not, at the time when &c., in the possession of tenants of the plaintiff, nor did the reversion thereof belong to him; 3rd, That the plaintiff, by means of the premises, was not injured in his reversionary estate and interest; 4th, Leave and license; and, 5th, (on which the question principally turned), That, before the said supposed reversion in the said declaration mentioned of the said lands therein mentioned, or any of them, or any part thereof, belonged to the plaintiff, and before and at the time of making the indenture hereinafter in this plea mentioned, the dean and chapter of Durham, of the cathedral church of Christ and blessed Mary the Virgin, were, and from thence hitherto have been and still are seised of the said lands in the said declaration mentioned in their demesne as of fee; and being so seised thereof heretofore and before the said reversion belonged to the plaintiff, and before any of the said times when &c., to wit, on the 28th day of September, 1832, by a certain indenture then made between the said dean and chapter of the one part, and the plaintiff of the other part, and which said indenture was then sealed with the chapter seal of the said dean and chapter, the said dean and chapter, for them and their successors, did de-

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mise and to farm let, unto the said William Walker, his executors, administrators, and assigns, amongst other things, the said lands in the said declaration mentioned, *excepting and reserving* the woods, underwoods, and trees then growing or thereafter to grow upon the said demised premises, and the mines, quarries, and seams of clay within and under the same, with full and free authority and power to cut down, take and carry away the said wood and trees, and to dig, win, work, get and carry away the said mines, quarries, and seams of clay, *with free ingress, egress and regress, way-leave and passage, to and from the same, or to or from any other mines, quarries, seams of clay, lands and grounds, on foot and on horseback, with carts and all manner of carriages, and also all necessary and convenient ways, passages, conveniences, privileges and powers whatsoever, for the purposes aforesaid, and particularly of laying, making, and granting waggon way or waggon ways, in and over the last-mentioned premises or any part thereof*, (paying reasonable damages for spoil of ground to be thereby done, upon the adjudication of two indifferent persons to be chosen by the parties), *always excepted and reserved* to the said dean and chapter, their successors, grantees, or assigns: To have and to hold the premises by the said indenture demised (except as in the said indenture excepted) unto the said William Walker, his executors, administrators and assigns, from the 2nd day of September then instant unto the full end and term, and during all the whole term of twenty and one years thenceforth next and immediately following, fully to be complete, ended and run, yielding and paying therefore as in the last-mentioned indenture is mentioned: That the plaintiff by virtue of the said demise afterwards, to wit, on the 3d day of September, in the year last aforesaid, entered into and upon the said demised premises, and became and was thereof possessed for the said term so to him thereof granted as aforesaid. And the said de-

defendants further say that the plaintiff, from the commencement of the said term by the said indenture granted, hitherto, and during all the time that the said supposed reversion in the said declaration mentioned belonged to him as therein also mentioned, was entitled to the said lands in the said declaration mentioned, under and by virtue of the said indenture and not otherwise, and had no right or title to or estate or interest in the same otherwise than and except under and by virtue of the said indenture. And the defendants further say, that after the making of the said indenture, and during the term thereby granted, to wit, on the said several days in the said declaration mentioned, when &c. the said defendants, as the servants and by the command of the said dean and chapter, entered into and upon the said lands in the said declaration mentioned, and in which &c., for the purpose of forming and making, and then formed and made, in, upon, and over the same lands, a certain road or way, being and which was such a road or way as was within the intent and meaning, and could and might be made by virtue and in pursuance of the said exceptions and reservations in that behalf contained in the said indenture. And the defendants further say that continually, from the time of making the said road or way so made as aforesaid hitherto, the said dean and chapter were ready to, and after the time of making the said last-mentioned road or way, and the committing of the supposed grievances in the said declaration mentioned, and before the commencement of this suit, to wit, on the 20th day of July 1836, did tender and offer to the plaintiff to pay him according to the last-mentioned indenture in that behalf, reasonable damages for spoil of ground done by means of the premises in this plea mentioned, upon the adjudication of two indifferent persons to be chosen by the parties according to the said indenture in that behalf, and then requested the plaintiff, together and along with the said dean and chapter, to choose and appoint two in-

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different persons to make such adjudication in that behalf, but that the plaintiff then wholly refused to accept the same, or to choose or appoint any such indifferent person or persons for the purpose of making an adjudication in that behalf. And the defendants further say that, for the purpose of and in forming and making the said road or way so formed and made as aforesaid, the defendants as the servants and by the command of the said dean and chapter, at the said times when &c., in the declaration mentioned, necessarily and unavoidably entered the lands in the declaration mentioned, and in which &c., and dug and excavated &c. And that by means of the premises in this plea mentioned, and not otherwise, the plaintiff was injured in his reversionary estate and interest, and otherwise as in the declaration mentioned, which are the same supposed grievances in the declaration mentioned, and whereof the plaintiff hath above complained against the defendants.—Verification.

Replication to 5th plea. That though true it is that the dean and chapter were seised in fee of the lands in the declaration mentioned as in the fifth plea is mentioned, and that the indenture above mentioned was made as in the fifth plea is stated, and that he the plaintiff had not and hath not any right or title to the lands in the declaration mentioned, except under and by virtue of the said indenture in the said fifth plea first above mentioned &c., for replication nevertheless the said plaintiff says *de injuriâ* &c.

The cause came on for trial before *Coltman, J.*, at the Durham Summer Assizes, 1837, when a verdict was found for the plaintiff. Damages £300. A bill of exceptions was tendered to the Judge on his reception of evidence and on his charge to the jury. The bill of exceptions stated the following facts:—A lease for 21 years of the lands in the declaration mentioned was given in evidence, from the dean and chapter of Durham to the said W. Walker,

bearing date September 28th, 1832, being the lease mentioned in the fifth plea, with the exception and reservation as stated in that plea. Also a memorandum made and dated the 18th of October, 1834, reciting that the trustees of the Marquis of Londonderry had taken of Walker the lands in the declaration mentioned for a term of nine years from that date. Also a letter from Walker to the attorney of the Durham and Sunderland Railway Company, dated 13th August, 1836, calling upon the Company, unless an amicable agreement should be entered into immediately, forthwith to stop the works.

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It was also given in evidence on the trial of the cause on behalf of Walker, that, in pursuance of a contract made with the Company, and under the directions of their engineers, certain cuttings and embankments had been made in the land of the plaintiff so let by him to, and which was in the occupation of Lord Londonderry's trustees under the agreement of 18th October, 1834; that the railway was at the time of the trial in an unfinished state, and that nothing was done by the Company but what was necessary for the making of it, but that the railway of the said Company was finished from the Marquis of Londonderry's railway all the way to Sunderland; that the Company began the railway at Broomside colliery, about half a mile nearer to Durham than Walker's land is, and that at the other end of the railway it was finished down to Sunderland; that a coach conveying passengers travelled daily all along that part of the railway; that the railway over Walker's land was not completed, and had not been used; that the Company had built an engine-house on Walker's land for the purpose of the railway, but that in building it no unnecessary damage was done to the land: That the quantity of the land of Walker which was taken for the purposes of the railway was 4 acres, 2 roods, 27 perches, and that double the annual value of the

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land so taken, including the injury done by reason of severance, was 59*l.* 15*s.* 9*d.*

The counsel for the Company on their part gave in evidence the act 4 & 5 Will. 4, c. xcvi, incorporating the Company, and empowering them to make a railway from the city of Durham to Sunderland near the sea, with a branch to join the Hartlepool Railway; by one clause of which (sect. 3) the Company were authorized to contract with any ecclesiastical corporation, &c., for granting leases to the Company for any term not exceeding 99 years, of any tenements, within (amongst other places) the parish of Pitlington aforesaid.

Also an indenture of lease made and bearing date the 21st March, 1835, from the dean and chapter of Durham to the said Company. (The bill of exceptions then set out the indenture, of which the following are the material portions.)

“That, in consideration of the yearly rents hereby reserved, and the covenants and agreements herein contained on the part of the lessees, the lessors do hereby, for themselves and their successors, (under or by virtue of the powers contained in the said act, and of every other power enabling them in this behalf, and so far only as they lawfully can or may, but not further or otherwise, grant or demise), grant, demise, and confirm unto the said Company and their successors full and free liberty, power, and authority to and for the said lessees and their agents, servants, and workmen, to enter into and upon (*inter alia*) all or any of the several lands or grounds now of or belonging to the said dean and chapter, situate and being in the township of Pitlington, and to form and make and maintain, in a line or direction therein specified, through or upon and over the same several lands or grounds, or any of them, upon such level and with such inclined plane or planes and in such manner in all respects as they, the lessees, shall think proper or deem expedient, one double

main road or way, not exceeding &c., commencing in &c., and from thence passing, or to pass, in, through, over, and along the several lands or grounds of or belonging to the said dean and chapter, situate and being in the township of Pittington aforesaid, of which W. Walker and others now are, or lately were, respectively lessees or holders under the said dean and chapter, and from thence &c., and from time to time (with the previous consent in writing of the lessors) to alter, change, or divert the same main road or way and premises, as occasion shall require, or the said lessees shall think proper or deem expedient, (here followed a similar power to make branches); and also full power and authority to use and to grant and authorize the use of the roads and ways or premises hereby demised, for the conveyance of passengers, coals, goods, wares, merchandizes, and other commodities, by any mode of conveyance whatsoever, whether of present use or future invention."

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And the said counsel for the said defendants also proved on the said trial, that the lands in the declaration mentioned were and are part and parcel of the lands in the indenture mentioned, of which Walker is named as the lessee, and also that the trustees of the Marquis of Londonderry on the 18th of October, 1834, made and executed the said agreement for a lease with Walker of that date; and also, on the 17th August, 1836, an agreement with one Robert Oliver, an agent of the Company: "1st, that the land occupied by the line of waggon-way was to be at the rate of £7 per acre; 2ndly, the gates and fences to be made as in other places on the line;" and communicated the same by letter to Walker. That the Company entered upon the lands of Walker to make their railway immediately after the last agreement, and made the excavations and embankments, and built the engine-house thereon, claiming a right to do so under the last-mentioned indenture, and that £7 per acre was an ample

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compensation for all damage, including severance, done to the land. That the railway of the Company, which was then in progress over Walker's land, was well calculated for carrying on a traffic in coals from several collieries mentioned to the westward of the county; and that in that part of the county there are extensive coal-fields, and that the railway was well adapted and properly formed for conveying coals from those districts down to the sea, of which coals there would be ample traffic; the railway being a double line, which was absolutely necessary for such a purpose. That the same line which would carry coal-waggons, would also convey passengers or waggons with goods. That the conveyance of coals produces greater wear and tear in a railway than lighter articles. That the carriage of passengers would increase the wear and tear, but would cause no other difference; and that the width of the railway in Walker's land was not more than the width of the parliamentary line; that the railway was calculated to carry 800 chaldrons of coals in twelve hours, and that the coal-fields available to the railway were likely to produce that quantity. That the engine-house so erected was not too large for the coal traffic likely to arise on the railway; and that, if it were wanted to carry passengers along the railway, it would not require a larger engine; and that it would make no difference to the owners of the lands through which the railway runs, if passengers were carried on the railway in addition to coals.

The learned Judge left the question to the jury, whether or not the said railway was made and constructed over the land of the plaintiff for other purposes than the conveyance of coals and other minerals, and did then and there declare and deliver his opinion to the jury on the trial, that if they found that the railroad so made on the land of the plaintiff was made for other purposes, as well as for the carriage of coals or other minerals, it was not such a road as could or might be made by virtue and in pursuance of the

said exceptions and reservations contained in the said indenture, notwithstanding the form and structure of the railway was fit and proper for the carriage of coals and minerals; and thereupon the said Justice then and there directed the jury to find their verdict for the plaintiff on the last issue, if, upon the evidence adduced on the trial, they thought that *the railroad was so made for the purpose of carrying passengers and goods as well as for the carriage of coals and minerals.*

Whereupon the counsel for the defendants did then and there, on their behalf, except to the opinion and direction of the said Justice touching the said last issue, and the matters adduced in evidence on the part of the defendants in support thereof as aforesaid, and insisted on the several matters as aforesaid as entitling the defendants to a verdict on the last issue, and as an absolute bar to the said action: and inasmuch &c. And the said jury thereupon under the said direction of the said Justice then and there found their verdict for the plaintiff on the said last issue, as also on the other issues, and £300 damages.

The case came on for argument in the Exchequer Chamber, Monday, November 29th, 1841, before *Tindal*, C. J., Lord *Abinger*, C. B., *Coltman* and *Maule*, Js., and *Parke* and *Rolfe*, Bs.

J. Addison, for the plaintiffs in error (the defendants below).—The question turns principally on the construction of the covenants in the lease. First, by the reservation there was reserved to the dean and chapter the right to grant way-leave, that is, a right of way in gross to and from any lands (not limited to lands demised by the dean and chapter) in all directions and for all purposes: secondly, if the grant is limited to the carrying coals and minerals, still on the pleadings that issue ought to have been found for the Company, because it is found that the railway was well adapted and properly formed for the carriage of coals,

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therefore the plaintiff below ought to have waited till it was used by passengers; at all events on that point a new assignment would be necessary.

As to the first point—The clause is in the nature of a grant. It was not a reservation, because that is always of a thing not *in esse*, but newly created or reserved out of the land or tenement demised; nor an exception, which is ever of part of a thing granted, and of a thing *in esse* (*a*), *Doe* d. *Douglas* v. *Lock* (*b*), *Sheppard's Touchstone*, c. 5, s. 9, p. 80, and *Wickham* v. *Hawker* (*c*). This right of road cannot be said to be something *in esse*, for there could be no right of road in the party who has the fee; nor can it be said to be something issuing out of land any more than the privilege of hawking, hunting, &c., which was held in *Doe* d. *Douglas* v. *Lock* (*b*), and *Wickham* v. *Hawker* (*c*), to be only a privilege or right granted to the lessor, though words of reservation and exception are used. If then it be a grant, it falls within the rule, that it is to be construed most against the grantor and in favour of the grantee. The grammatical construction is to be remarked. The words are “excepting and reserving the woods, &c., and the mines, &c., in the demised premises, with full and free authority and power to cut down the one and dig the other, with free ingress, egress, regress, way-leave and passage to and from the same, or any other mines, &c., lands, and grounds; and also all necessary and convenient ways, passages, conveniences, privileges, and powers whatsoever, for the purposes aforesaid, and particularly of laying and granting waggon-ways in and over the last-mentioned premises.” The *purposes aforesaid* are, *inter alia*, way-leave and passage to and from other lands, to effect which it may be necessary to make roads. Then to what can you refer “of” but to the words powers and privileges? [Lord

(*a*) Co. Lit. 47. a.

(*b*) 2 A. & E. 705; 4 N. & M. 807.

(*c*) 7 M. & W. 63.

Abinger, C. B.—For the purpose of.] If so, those words would have been repeated. Before railways were known, the reservation in ancient leases would have stopped at the words “for the *purposes* aforesaid,” but the remainder has probably been added since as being more applicable to modern times. The sentence if possible should be read without the introduction of fresh words. Then if the natural construction be that the word “*of*,” belongs to “power,” the dean and chapter have the privilege of granting a way-leave over the lands in question. That being assumed, what are the purposes aforesaid? You must reject the words, “*other* mines and lands,” or give to them their natural purport, and there is nothing to confine it to the lands demised, or the carriage of minerals, for it goes on to say “*lands and grounds*.” Therefore on the true construction of the reservation, the power of granting a general right of way in gross is in the dean and chapter for all purposes, and there is nothing to confine it to the carriage of minerals.

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But secondly, if this right is to be so limited to the carriage of coals and minerals, on the issue whether the road was good for that purpose, the *intention* of making a way for passengers could not be entered into. The intention to use it afterwards would not make them trespassers *ab initio*, it having been proved at the trial that it had not been so used. Where a party claims to act under authority which is illegal, but he has a legal authority also, he may justify under the legal one; as, in a joint distress under four warrants, one of which was bad and three good, it was held the distress was not therefore void. *Governors of Bristol Poor v. Wait* (a). So, in an arrest of a party under two writs, *Blessley, v. Sloman* (b). Or, where a bailiff has levied too much under a warrant, he is not a trespasser

(a) 1 A. & E. 264.

(b) 3 M. & W. 40.

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ab initio. *Shorland v. Govett* (a), *Lucas v. Nockells* (b). [Tindal, C. J., That is by statute.] These cases shew that a claim by a man to do more than he has a right to do, does not make him a trespasser *ab initio*, if he had a right to do what he did. It was proved that the railway lower down was open, and there they were carrying passengers, but over Walker's land it was not completed, and had not been used; can then the mere intention of using this way make them such trespassers, or make that a road which was not one under the reservation?

But if such an intention was an abuse and excess of the privilege, the plaintiff below should have been assigned. In the plea the Company justify the right to make a road, the reply is, "Admitting such grant, you did it of your own wrong, *absque residuo causæ*." That does not traverse the allegation that the trespasses were committed in making the road, which are the same trespasses as in the declaration; it only traverses the cause, which is the foundation of a new assignment. See *Mellor v. Walker* (c). In *Lucas v. Nockells*, Parke, B., says, "It is quite clear that all acts done which make the party unjustifiable under the authority of the law, and a trespasser *ab initio*, cannot be given in evidence under the general traverse, but must be specially replied." Therefore in this case, though it is not admitted that the intention made the Company such trespassers, yet, if it did, it ought to have been new assigned.

W. H. Watson, contra.—It is not alleged in the 5th plea that the lease or counterpart was executed by Walker the lessee, nor in the special verdict (d). There is therefore no acceptance by the lessee, and consequently it is no grant, but either an exception or a reservation. That being the

(a) 5 B. & C. 485.

(b) 10 Bing. 156.

(c) 2 Wms. Saund. n. (3), p. 5 e.

(d) But see Co. Litt. 231. a.

case, there are four modes in which it may be construed :

1. As a right of way to and from mines excepted by the lease under the demised lands, and to get their produce.

2. That it is confined to mines of the dean and chapter, other than those under the land.

3. That it is to be extended to all mines of all persons, and the carriage of all produce.

4. That there is a power reserved to the dean and chapter to grant ways and way-leaves for all purposes whatsoever.

1. The lease, after demising the lands, excepts thereout the woods, mines, &c., which is clearly a good exception, being part of the thing demised : then comes the power to cut woods and work the mines, with way-leave to the same, *or to or from any other for the purposes aforesaid*. Those purposes were to except to the dean and chapter the right to work mines *there*, and must govern the whole of the sentence ; therefore there is nothing contained in it to extend to entering other woods or working other mines. The principal is the working the mines themselves ; the accessory the right of way to them. [Lord Abinger, C. B.—The purposes aforesaid are to cut down and work and have free ingress &c. to and from the same, *or any other*.] The words do not import that ; they are the words of the grantor, and to be taken most strongly against himself, and, therefore, only apply to mines in that land : Sheppard's Touchstone, p. 100 ; Co. Litt. 42. a., 188. b. ; *Lofield's case* (a) ; Burton's Real Property, p. 165 ; *The Earl of Cardigan v. Armitage* (b) ; *Buller v. Denning* (c) ; Com. Dig., Fait. Then, is there any doubt here ? The words used are "*with*," not *and* "free ingress" to and from other mines &c. *for the purposes aforesaid* : that is, to work in the land of A. to get coal in the land of B. by what is called out-

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(a) 10 Rep. 106 b. (b) 2 B. & C. 197. (c) 5 B. & C. 842.

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stroke. That would be an exception of the mines, and the product of them, and a way for that purpose to and from the land demised, and to and from any other land. In *Dand v. Kingscote* (a), it was held unnecessary to decide whether the easement extended to coals within the *territories* of A., the township wherein the lands demised were situated; and there is no doubt that it is impossible to except and reserve such an easement as this of laying railways, and it must be by grant. In *Wickham v. Hawker* (b), Parke, B., says, p. 79, as to the difference between a personal license and license of profit, "The case in the Year Book, 11 Hen. 7, fol. 86, bears materially on this view of the case. It is there said, 'If one license me *and my heirs* to come and hunt in his park, I must have a writing (that is, a deed) of that license; for *a thing passes by the license*, which indures in perpetuity: but, if he license me one time to hunt, this is good without deed, for no inheritance passes.'" And, in *Hewlins v. Shippam* (c), Bayley, J., says, (p. 232), speaking of the case of *Hoskins v. Robins* (d): "According to the report in Saunders, Hale, C. J., and the Court seemed to be of opinion, that the license could not be granted without deed." Then it is contended, that this is a grant in gross. To whom or how is it limited? Is it to the dean and chapter, or their servants, or grantees, or to grant to another that he may grant a way? There is no authority for such privilege (e). [Lord Abinger, C. B.—It cannot be in gross; for, if the dean and chapter assigned, this privilege would pass.] That is the distinction; if it were in gross, it would belong to the reversioner.

2. If these words have a larger meaning than taking

(a) Antè, Vol. 2, p. 46; *S. C.* 327.
 6 M. & W. 174.

(b) 7 M. & W. 63.

(c) 5 B. & C. 221.

(d) 2 Vent. 123—163; 2 Saund.

(e) See the judgment in *Wickham v. Hawker*, 7 M. & W. 77, as to construing reservations for servants, &c.

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coals in the land demised, they cannot be enlarged more than to other lands of the dean and chapter. There is a great mass of law in the old books as to granting ways to other lands. In a case in the Year-Book, 21 Edw. 3, fol. 2, pl. 5, it is said, that if a way be granted to a mill, which the grantee has not then, but purchases afterwards, he cannot bring his assise (*quod permittat*), but must be left to his breach of covenant. In Fitzherbert's Natura Brevium, Assise of Nuisance, 183, N., it is said—"And a man shall have the like writ, if a man have a way to his land or house, and another stop the way, he shall have an assise of nuisance for that stopping." And, in a note to that passage—"So that it ought to be a way appendant; for of a way in gross he shall only have a writ on his case; 11 Hen. 4, 26, *per Cur.*; and so of a way to a church, because he has no freehold in the church; 4 Ed. 3. Nuisance, 8; but *contrà* it seems as to a way to a church which one has *ratione tenuræ*." See also Brooke's Abridgment, Chimyne, 7. In *Godley v. Frith* (a), a way is said to be an easement only, not an interest; and, in *Alban v. Brounsall* (b), the prescription was said to be not good, "because it was not shewn *à quo loco ad quem locum* the passage or way is: and although a way may be in gross, yet it ought to be bounded and circumscribed to some certain place." From these cases it appears that such an easement must be annexed to some land, not person. [Lord Abinger, C. B.—You say a grant to a man of a right of way to a place in which he has no interest is appurtenant to nothing, and not assignable; but that he is left to his action of covenant.] In Burton's Real Property, p. 386, (1166), a private right of way, if in gross, seems to be not properly a tenement, but it may be annexed to a house or land, and made to

(a) Yelv. 159.

(b) Id. 163.

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follow it through all circumstances of ownership. Therefore, if this is to be construed as a right to make a way and carry coal, it must be with relation only to lands of which they are seised; that is, other the mines and grounds of the lessors.

3. This cannot be a way for all purposes. Then suppose it a way from other lands, it is for mineral purposes only. The word "lands," coupled with "mines," must be taken *ejusdem generis*; that is land where the mines happen to be. In *Wallis v. Harrison* (a), the contention was, that the dean and chapter had a right to carry all the mineral produce of the county; and that seemed to be the opinion of the Vice-Chancellor and Lord Chancellor in *Farrow v. Vansittart* (b), that, even if such a privilege as that were intended, it did not extend to conveying passengers and general merchandize.

4. The only other construction, the granting ways over the land in question for all purposes and times, would destroy the subject-matter of the demise; it would take away the whole benefit of the surface, which is the thing granted. A railway is an actual ouster. *Doe d. Wagon v. Horn* (c), *Badger v. Ford* (d), *Arlett v. Ellis* (e). It is like a right of common granted to commoners, with power to destroy it; so, in this case, it cannot be supposed that such unlimited powers were intended to be conferred.

One of the three first modes is the true construction, and in either of them the learned Judge was right; as to the two first, if the reservation or exception, or grant for a way, was merely to and from lands of the dean and chapter, and as to the third, if it was for mines under their or other lands, and also because it is not shewn by the evi-

(a) Pòst, p. 64.

& W. 564.

(b) Antè, Vol. 1, p. 602.

(d) 3 B. & A. 153.

(c) 3 M. & W. 333; and 5 M.

(e) 7 B & C. 346.

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dence to which the direction was addressed, that the way in question was directed to and from any mine, or any purpose shewn; for, though getting coal might have been the purpose, it is too remote to be considered. The right of granting and making ways is limited to the necessity of getting coal, and the form of pleading is too general. They do not say because coals were about to be gotten, it was necessary to make a railway, but that it was *such a way* as might be made according to the true intent and meaning of the reservation. It is not because coals *may* be got, that therefore there is a right to make a railway. In *Dand v. Kingscote (a)*, it was held that the allegation in the plea, "that it was convenient and necessary to make the road *at the time when it was made*," ought to have been proved. So here the summing up was, that there was no occasion for a way for coals. If it had been shewn to be convenient and necessary then, the Judge would have been wrong, but that is not so here, because there is no statement in the plea, or evidence that it was so. And again, suppose this a way laid for a double purpose, one within and the other without the grant, reservation, or exception, though it might be that coals might be carried on it, yet if made for the enlarged purpose of carrying passengers, and for all purposes, it was not such a way as was contemplated. The plea ought to allege that it is convenient and necessary for such a purpose; there was no immediate necessity or expectation of raising coals. [*Parke, B.*—The point is whether the plea ought to state a necessity, and if so, whether it does so here, so as to be good on general demurrer.] The plea says they entered to make a road which was such a road as might be made within the intent and meaning of the grant; that may be true, and yet not necessary. [*Lord Abinger, C. B.*—They involve necessity

(a) *Antè*, Vol. 2, p. 47.

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under the word "might," and you traverse.] They do not say a road which might be made, but such a road as might be made. The traverse is only of what is contained in the plea, and is either included in these words or not. If it is not, the plea is bad; if it is, there is no evidence to support it. [Lord Abinger, C. B.—Would the plea be bad after verdict?] Yes, there is no right till occasion requires, till coals are either got or about to be got. Therefore, assuming lands and grounds to be *ejusdem generis* with mines, this railway must be made to and from mines.

As to the necessity of a new assignment in this case, the cases cited do not apply. Suppose this way to be entirely within the contemplation of the act, they set up a right to put it there for a double purpose. The plea therefore may be treated as if it said the way was for coals and passengers, instead of saying it was within the exception. *Jackson v. Stacey* (a), *Cowling v. Higginson* (b). They must not use such extensive words without defining the right, and the plea is larger than the proof. See *Drewell v. Towler* (c), *The Marquis of Stafford v. Coyney* (d). The replication denies the right to such a way by denying that the way made was within the exception: therefore as the traverse is in substance a traverse of a general right, there is no necessity for a new assignment, which is when something has been done not within the plea.

J. Addison in reply.—It must be assumed after verdict, that this deed was under the seal of the lessee. The plea mentions an indenture *inter partes*. But if not, it would still operate as a grant. A party who assents to take an estate with such a grant out of it, takes it in the most

(a) Holt, N. P. 455.

(b) 4 M. & W. 245.

(c) 3 B. & Ad. 735.

(d) 7 B. & C. 257.

effectual manner for the grant. Therefore if the demise would be good, the reservation or grant is also good. In *Vivian v. Champion* (a), it was held that a plaintiff having taken issue on another part of the plea, admitting such an indenture cannot turn round. Then it is contended that this is a right of way in gross which cannot be assigned, and a case is cited of a road to a mill, but that might have been held void because there was no *terminus*. This might be a license at all events. As to *Dand v. Kingscote* (b), the great question was whether they could go to and from lands in other townships: and in *Farrow v. Vansittart* (c), both the Lord Chancellor and Vice-Chancellor said it was a question for a Court of law, and would not interfere, but the Vice-Chancellor did admit that the words "of laying, &c.," related to railways, but omitted "to and from any other lands," which are the words relied upon here.

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As to the objection to the record that the time and necessity are not arrived, that is only ground of special demurrer. There is sufficient allusion to the power under which the Company entered to make the road, and that the road was made under that power; if so, it cannot be objected to after pleading over and a verdict. But as to the reasonable time, the evidence shows they put off entering the land as long as they could, which proves they were not unreasonably hasty or premature in making the road.

As to the cases cited to shew a new assignment unnecessary, *Jackson v. Stacey* (d) was where a party had actually used the road for a purpose to which his right did not extend; he claimed a right larger than he had. So, in *Cooling v. Higginson* (e), the plea claimed a general right of

(a) 2 Ld. Raym. 1125.

(b) Antè, Vol. 2, p. 47.

(c) Antè, Vol. 1, 602.

(d) Holt, N. P. 455.

(e) 4 M. & W. 245.

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road, where there was only a limited one. If the road was such as could be made under the reservation, but made for other purposes, there ought to have been a new assignment.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the Court:—This was an action on the case, brought by W. Walker (the defendant in error) against the Durham and Sunderland Railway Company, and two of their servants, wherein he complained of an injury to his reversionary interest in certain lands at Pittington, in the county of Durham, in the possession of his tenants, by reason of the Company having cut and formed a railway through those lands.

The defendant below pleaded, by way of justification, that the dean and chapter of Durham, being seised in fee of the lands in question, by an indenture of lease, dated the 28th day of September, 1832, demised the same to the plaintiff below for a term of twenty-one years, from the 2nd day of September then instant, subject to certain yearly rents thereby reserved, and with an exception and reservation of the mines and minerals, and of certain rights of way, and of granting way-leave, which, on the part of the plaintiffs in error, it was contended, enabled the dean and chapter to authorize them to make the railway in question. The plea then avers that the plaintiff has no title to the land, except under that demise, and goes on to state that the defendants, the Forsters, as the servants of the dean and chapter, and by their authority, entered upon the lands and formed the railway across the same, such railway being a way which, under the exception and reservation contained in the deed, the dean and chapter had power to make.

To this plea the plaintiff, admitting the seisin in fee of the dean and chapter, and the demise to the plaintiff, and

admitting that he had no title except as lessee under that demise, replied "*de injuriâ absque residuo causâ.*"

The cause was tried before Mr. Justice *Coltman*, at the Durham Summer Assizes, 1837. On the trial, the plaintiff gave in evidence, amongst other things, the lease set out in the plea, and the exception and reservation, on which the Company relied, appeared to be in the following words. [His Lordship then read the exception.]

The defendants then gave in evidence a deed under the seal of the dean and chapter, authorizing them to make a double line of railway across the lands in question, and to use the same for the conveyance of passengers, goods, coals, wares, and merchandize, and it was proved that, in pursuance of that authority, the Company had formed a double line of railway through a very considerable line of country, including the lands in question.

Evidence was given, on the part of the plaintiff, to shew that the railway was constructed for the purpose of being used for the conveyance of goods and passengers as well as of coals and minerals; and, on the part of the defendants, to shew that the railway was not more than was necessary for the carriage of the coals and minerals likely to be sent along it from the western part of the county, with which it communicated.

Upon this evidence, the learned Judge declared his opinion to the jury, that, if the railway was made for other purposes *as well as* for the carriage of coals and minerals, it was not such a road as could be made in pursuance of the exceptions and reservations contained in the indenture of demise; and he directed them, that, if they thought the railway was so made for such other purposes *as well as* for the carriage of coals and minerals, then they ought to find a verdict for the plaintiff.

To this direction the counsel for the defendants excepted; and the question for our decision is, whether the

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direction of the learned Judge was right. And we think it was not.

The injury of which the plaintiff complains is not a trespass affecting his possession of the land in question, for he is not in possession at all; but it is the injury to the inheritance occasioned by the defendants having, as he alleges, wrongfully made, across the lands of his tenants, a railway which they, the defendants, were not warranted in making, thereby lessening the value of his reversion. Now, if the railway is such a railway as the defendants, at the time when it was formed, might lawfully make, for the purpose for which when made they might lawfully use it, the plaintiff can have no ground of complaint by reason of the intention of the defendants also to use it for other purposes for which they have no right to use it. Such an unwarranted use of the railway, if afterwards put in execution, may entitle the tenants in possession to maintain an action of trespass, but the mere intention to commit such a trespass is no injury to the reversioner, and we, therefore, think that the direction of the learned Judge was incorrect.

The proper question for the jury, as it appears to us, was, not whether the railway was made for other purposes as well as for the carriage of coals and minerals, but whether it was such a railway as, at the time when it was made, it was reasonable and proper to make for the purposes for which it was lawful to make it, and for those purposes only.

This being so, it follows of necessity that a *venire de novo* must be awarded.

But it would be a very unsatisfactory decision of this case, if we were simply to award a *venire de novo*, without, at the same time, declaring our construction of the deed as to the purposes for which the dean and chapter, or those who claim under them, are thereby authorized to make a railway.

That is a question of law to be decided by the Court, after the decision of which there can be no difficulty in putting the case properly before the jury.

Now, on the argument of this case, four different constructions of the clause in question were suggested.

First, it was said, that the meaning was to reserve to the dean and chapter an unlimited power of granting way-leaves, over all or any part of the lands demised, without any restriction whatever as to the uses to which the ways should be applied.

Secondly, if that were considered too wide a construction, then it was contended that the clause authorized the granting of way-leaves for the purpose of carrying coals and minerals from whatever mines they might have been raised and gotten.

Thirdly, it was argued that, at all events, the dean and chapter had, under the reservation, the power of granting way-leaves for the transport of their own mines and minerals, whether raised from under the lands demised or from under any other lands.

And, fourthly, it was contended that the deed in fact gives no power to the dean and chapter, except that of making ways, and granting way-leaves, for the purpose of getting the coal and minerals excepted in the demise.

The important question for our decision is, which of these constructions ought to be adopted; and we are all of opinion that the fourth, which is the most limited construction, is the correct one, and that the only right reserved to the dean and chapter under the clause in question, is that of making and granting the right of making ways over the demised lands for the purpose of getting the excepted wood, mines, and minerals.

The exception is of "*all woods, underwoods, and trees, growing or to grow on the demised premises, and of all mines, minerals, and seams of clay within and under the same, with full power to cut down and carry away the trees, and to dig,*

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win, and carry away the mines, quarries, and seams of clay, with free ingress, egress and regress, way-leave and passage to and from the same." If the words of the exception had stopped here, it would have been quite clear that the right of way intended was only a right of way for the purpose of getting the trees and minerals excepted. It would in truth have been, like the words immediately preceding, viz. "*with power to dig, win, get, and carry away,*" nothing more than what the law would, if necessary, have given as incident to the exception—a right of passing to and fro for the purpose of making the exception available. But the language of the exception goes on further, viz. "*or to or from any other mines, quarries, seams of clay, lands and grounds, on foot or on horseback, &c., and also all necessary and convenient ways, privileges and powers whatsoever, for the purposes aforesaid, and particularly of laying, making, and granting waggon-ways in and over the said premises or any part thereof, &c."*

These are the words which create the doubt. Are they introduced for the purpose of securing to the dean and chapter a general right of way and of granting way-leaves over the demised lands for purposes other than that of getting the matters excepted, or are they confined to that object alone? We have already stated that we think they are confined to the latter object.

The things excepted are the trees and minerals, and we consider all which follows as mere accessories to the exception. The word "*with*" must be taken to mean "*and as incident thereto,*" so that the passage must be read as if it was framed thus:—*Excepting the trees, mines, and minerals, and, as incident thereto, full power to cut down &c. the trees, and dig, work, and carry away the mines &c., and, as incident to such digging &c., free ingress, way-leave, &c., to and from the lands demised, and to and from any other lands and grounds. And also all convenient ways, privileges and powers whatever for the purposes aforesaid, (i. e.*

for the purpose of getting the excepted trees, mines, and minerals), *and particularly the power of making and granting ways and way-leaves for those purposes*. Neither the way-leave to and from the mines in and under the lands demised, nor the way-leave to and from other lands and grounds, purports to be excepted or reserved as a distinct matter of exception or reservation. Both the one and the other are mentioned in connection with the mines excepted, and in no other manner whatever. The right of way to *other lands and grounds* is connected with the right of way to the mines &c. reserved, only by the disjunctive “or”—*excepting mines &c. with a right of way to and from any other lands and grounds*. If the intention had been to reserve to the dean and chapter a right of way, and still more a right of granting way-leaves, independently of the right to get the excepted trees and mines, such a right would surely have been treated as a separate matter unconnected with the previous exception, more particularly being, as it was stated to us in the argument to be, a right of the greatest value and importance. There is nothing unreasonable in supposing that the lessors meant to reserve to themselves a right of getting the excepted mines and materials by means either of shafts and pits to be sunk on the demised premises, or, if it should be more convenient, by means of shafts or pits already sunk or to be sunk on adjoining lands, and, if such was the intention, the language of the deed is perfectly well adapted to carry it into effect.

It is to be observed, that a right of way cannot in strictness be made the subject either of exception or reservation. It is neither parcel of the thing granted, nor is it issuing out of the thing granted, the former being essential to an exception, and the latter to a reservation. A right of way *reserved* (using that word in a somewhat popular sense) to a lessor, as in the present case, is, in strictness of law, an easement newly created by way of grant from the grantee or lessee, in the same manner as a right of sporting or fish-

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ing, which has lately been much considered in the cases of *Doe d. Douglas v. Lock* (a) and *Wickham v. Hawker* (b).

It is not, indeed, stated in this case that the lease was executed by the lessee, which would be essential in order to establish the easement claimed by the lessors as in the nature of a grant from the lessee; but we presume that, in fact, the deed was according to the ordinary practice executed by both parties, lessee as well as lessors.

It was pressed in the argument, on behalf of the plaintiffs in error, that general way-leaves or powers of granting rights of way over lands demised, as easements reserved to grantors or lessors, are so very usual in the north of England, and often constitute so very valuable a property, that the Court will so construe the reservation as to carry out this presumable intention.

But to this we cannot accede. Indeed, if we were to hazard a conjecture on this subject, we should be strongly disposed to think that the words in the present lease, and which it was suggested are the same as occur generally in leases from the dean and chapter, were probably first introduced long ago, before the great importance of way-leaves had been fully felt or understood either by grantors or grantees, and when really nothing more was thought of than the subject-matter actually excepted, and what was necessary for the purpose of making that available, and that the same words have been subsequently retained without much attention to their precise import.

Be that, however, as it may, we are clearly of opinion that the ways referred to in the exception in this case are confined to ways necessary or proper for enabling the lessors to get the matter excepted, and in like manner that the powers mentioned in the latter part of the exception, and particularly the power of granting rights of way, are

(a) 2 A. & E. 705; 4 N. & M. 807.

(b) 7 M. & W. 63.

powers which can only be exercised "*for the purposes aforesaid*," i. e. for the purpose of getting the excepted trees, mines and minerals.

A *venire de novo* must therefore be awarded, and the questions for the jury will be, whether, at the time when the road was made, it had become necessary or expedient for the dean and chapter, or those claiming under them, to make a road for the purpose of getting the excepted mines; and, if so, whether the road actually made was a proper road for that purpose, assuming that it would be used for no other object.

If either of these questions be answered in the negative, then the plaintiff below will be entitled to compensation in respect of any construction of a permanent nature, which would be an injury to the reversion, and the jury may consider to have resulted from the making of a road at all, or the making of a road unnecessarily large, as the case may be.

Venire de novo awarded (a).

(a) COURT OF EXCHEQUER.

Sittings after Hilary Term, 1842.

WALLIS & HARRISON AND OTHERS.

TRESPASS for breaking and entering a part of a close of the plaintiff called The Deepa, and digging, &c., the soil of the said close, and making cuttings and embankments and a certain railway therein, and causing divers steam-engines and carriages loaded with goods, coals, and passengers to pass, &c., over the said close, &c.

Plea—1st, Not guilty; 2nd, Plaintiff not possessed of the said part of the said close; 3rd, Leave and license; 4th, Justifying the making and continuing the railway under a grant of a way-leave from the dean and chapter of Durham, under a reservation in a lease to that effect, and alleging that the railway was a proper and convenient waggon-way from divers mines, for the purpose of digging and carrying away the said mines &c., according to the true intent and meaning of the indenture of lease, which said waggon-ways were convenient and necessary ways for the purposes in the said indenture.—Replication, *De injuriâ*.

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See the marginal note in *The Durham and Sunderland Railway Company v. Walker*, ante, p. 36.

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At the trial, before *Rolfe*, B., at the Durham Spring Assizes, 1841, it appeared that the defendants, the proprietors of the Stanhope and Tyne Railway, had made the railway over lands demised to the plaintiff by the dean and chapter, under the grant of a way-leave for that purpose. The minerals conveyed on the railroad were not obtained from any lands belonging to the dean and chapter. The learned Judge directed the jury, that, under the way-leave reserved out of the lease by the dean and chapter, the defendants were justified in making the railroad in question. The jury found a verdict for the defendants, and *Knowles*, in Easter Term, 1841, having obtained a rule *nisi* for a new trial, on the ground of misdirection,

Dundas, *Robinson*, and *Fry* shewed cause (a), and cited *Dand v. Kingscote* (b), *Farrow v. Vansittart* (c), *Wickham v. Hawker* (d), *Senhouse v. Christian* (e), *Gerrard v. Cook* (f), *Doe d. Douglas v. Lock* (g), *Earl of Cardigan v. Armitage* (h), *Doe d. The Earl of Shrewsbury v. Wilson* (i), *Parkhurst v. Smith* (j), and *Noy's Maxima*, p. 55.

Knowles and *W. H. Watson*, contra, cited *Sheppard's Touchstone*, p. 100, *Bailey v. Appleyard* (k), *Com. Dig. Fait. (E.)*, 7, 8, and *Gale on Easements*, p. 8.

Cur. adv. vult.

ALDERSON, B., now delivered the judgment of the Court.—In this case the rule for a new trial will be absolute. It is unnecessary to give our reasons, as they are contained in the judgment which has just been delivered in *The Durham and Sunderland Railway Company v. Walker* (l).

Rule absolute.

(a) May 27, 1841, before Lord Abinger, C. B., Alderson, Gurney, and Rolfe, Bs.

(b) 6 M. & W. 174.

(c) Antè, Vol. 1, p. 602.

(d) 7 M. & W. 63.

(e) 1 T. R. 560.

(f) 2 N. R. 509.

(g) 2 A. & E. 706.

(h) 2 B. & C. 197.

(i) 1 B. & A. 363.

(j) Willes, 332.

(k) 8 A. & E. 161.

(l) Antè, p. 56.

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IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

TAYLOR v. CLEMONS and Another.

Feb. 17th.

ASSUMPSIT for use and occupation. The declaration stated that the defendants, on the 3rd March, 1839, were By a Railway Act (6 & 7 W. 4, c. cxi, s. 138), it is enacted,

that if any landowner &c. shall not agree with the Company as to the amount of the purchase-money for his lands—or shall refuse to accept such purchase-money—or to treat with the Company—or should not agree for the sale—or shall by reason of absence &c. be prevented from treating—or shall not disclose his title—or in any other case when agreement for compensation cannot be made—the Company shall issue their warrant to the sheriff to summon a jury to assess the purchase-money for such land, and the sheriff shall give judgment, and the verdict and judgment shall be binding and conclusive upon all persons whatsoever. Provided that seven days' notice shall be given by the Company to the party of the time and place of holding the inquisition.

By sect. 140 such verdicts and judgments shall be deemed records to all intents and purposes.

Sect. 5 provides, that the Company may make the railway through lands omitted in the act, &c., if it should appear to two justices, *in case of a dispute about the same*, and be certified by them, that such omission proceeded from mistake.

In an action for use and occupation, the defence was, that the defendants had been lawfully evicted by the Railway Company under the above act. A special verdict was found, which stated that the plaintiff's premises in question consisted of a house, and a yard and garden occupied therewith, and included in the description thereof; that *the house* had been omitted in the schedule by mistake, and was so certified by two justices; that the Company had given the plaintiff notice to treat; that he did not disclose his title, or agree for the sale; whereupon they issued their warrant for assessing the amount of purchase-money, and gave him due notice of the inquisition; that the inquisition was held before the sheriff and the amount assessed; that the sheriff gave judgment for it, and that the Company had paid it into the Bank of England to the credit of the plaintiff.

The verdict set out the certificate of justices, the notices, and the inquisition, with the warrant annexed to it. The warrant, stating that it was issued pursuant to the act, commanded the sheriff to summon a compensation-jury, &c. The inquisition stated that the jury had been returned in obedience to the warrant, the purchase-money awarded, and judgment given by the sheriff pursuant to the act.

It was objected—1. To the warrant and inquisition,—that they did not on the face of them shew jurisdiction, not stating which of the cases under sect. 138 had arisen to justify the taking compulsory proceedings, or the certificate of the justices; and that the inquisition did not set out the notice of inquisition. 2. To the certificate,—that it did not state that a *dispute* existed between the parties, so as to give jurisdiction to the justices, and that it certified as to *the house only*, omitting the *yard and garden*, which were also omitted in the schedule.

Held 1. That the warrant and inquisition being annexed together might be considered as one entire proceeding, and any deficiency existing in the one, be aided by reference to the other; and that as the warrant stated that it had been issued, and the inquisition that judgment had been given for the purchase-money, pursuant to the act, the proceedings themselves upon fair inditement afforded the inference, that a previous agreement for the purchase could not be made.

That the statement of the certificate was not necessary, the effect of it being simply to rectify the omission in the schedule, and to extend the operation of the statute to the land &c. in the certificate, as if they had been originally asserted in the schedule.

2. That the fact of the justices being applied to, and granting their certificate, was evidence of a *dispute*, so as to render the statement unnecessary.

And that, as the verdict found that the yard and garden were parcel of and included in the description of the house, and occupied therewith, they passed with it.

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indebted to the plaintiff in 26*l.* 5*s.*, for the use and occupation of certain messuages, cottages, cellars, a school-house and premises, with the appurtenances.

Pleas: 1. As to 14*l.*, parcel &c., payment of that sum into Court, and a denial of damages *ultrà* in respect of that sum. Verification. 2. As to the residue, *non assumpsit*.

Replication: 1. Acceptance of the 14*l.* in satisfaction. 2. Issue joined.

The cause was tried before *Maule, J.*, at the Liverpool summer assizes, 1839, when the jury returned a special verdict, stating the following facts:

Before the passing of the 6 & 7 Will. 4, c. cxi (local, personal and public), intituled "An Act for making a Railway from Manchester to Leeds," the defendants were tenants to the plaintiff of the premises mentioned in the declaration, and more particularly specified in the particulars of demand hereinafter mentioned, for a certain term, at the yearly rent of 26*l.* 5*s.*, payable quarterly &c., which premises were in the occupation of certain persons hereinafter named, as under-tenants of parts thereof respectively to the defendants.

The particulars of demand annexed to the record claimed four quarters' rent, from the 25th December, 1837, to the 25th December, 1838, "of a house, cottage, two cellars and a school-house, situate in or near to St. George's Street, Oldham Road, in Manchester, in the county of Lancaster."

The particulars were afterwards amended, by inserting the words "yard and garden" after "school-house."

On the 18th June, 1838, the Manchester and Leeds Railway Company, who were constituted and incorporated by the statute above mentioned, entered upon and took possession of the premises in the declaration mentioned, claiming title thereto, as hereafter mentioned, and ejected the defendants and their under-tenants.

The verdict stated, "that the said tenancy would have

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continued, and the plaintiff would have been entitled to such rent to the 25th December, 1838, unless the said tenancy was determined by the said eviction and proceedings of the said Company, and the facts and circumstances found in this special verdict. That the sum of 14*l.*, brought into Court by the defendants, under their first plea, is more than sufficient to cover any rent to which the plaintiff was or would be entitled from the defendants, for or in respect of the said premises, or the use or occupation thereof, for any time before the expiration of the quarter ending on the 24th June, 1838. That the defendants did promise in manner and form as in the declaration alleged, as to the residue of the cause of action beyond the 14*l.* in the first plea of the defendants mentioned, unless the defendants ceased to be tenants as aforesaid to the plaintiff, under and by virtue of the said eviction, and the proceedings of the said Company, and facts and circumstances found in this verdict; but, if, under and by virtue of the said eviction, &c. the defendants ceased to be tenants of the premises aforesaid to the plaintiff, before the 24th June, 1838, then the defendants did not promise &c., as to the residue &c., beyond the 14*l.* in the first plea mentioned."

The verdict then stated the due deposit of maps, plans, and books of reference, containing lists of land-owners &c. with the clerks of the peace, and the requisite subscription of capital, and also found "that the messuages, lands, tenements and hereditaments, mentioned in the notices of the said Manchester and Leeds Railway Company, hereinafter next mentioned, and in the warrant and inquisition hereinafter also mentioned and set forth, comprehending, with many other things, the premises in the said declaration and particulars of demand mentioned, were delineated upon the said maps or plans, and described in the said books of reference so deposited with the said clerks of the peace."

The Company having occasion to take, use, and purchase,

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for the purpose of making the railway, works, and conveniences, authorized by the said act, the messuages, lands, tenements and hereditaments, mentioned and particularised in the notices of the said Company hereinafter next mentioned, and in the warrant and inquisition hereinafter also mentioned and set forth, including amongst others the premises in the declaration and particulars of demand mentioned, in all which messuages, lands, tenements and hereditaments, the plaintiff claimed to be interested, on the 28th October, 1837, caused notices to be served, and the same were accordingly served upon the plaintiff and defendants, and the other persons named in the notices, and to whom they were addressed; the plaintiff and defendants, and the several other persons so named in the said notices, and to whom the same were addressed, being the several persons interested, or reputed to be interested, in the messuages, lands, tenements and hereditaments therein mentioned, which notices were to the effect following, &c. and were severally addressed to the plaintiff and defendants, and other persons therein named, as follows :

Notice to treat.

“ You are hereby required to take notice, that by virtue and under the authority of the following acts of Parliament, or one of them, namely, the 6 & 7 Will. 4, c. cxi, and 7 Will. 4, c. xxiv, all that parcel of land, together with the buildings, if any, thereon, and other the tenements and hereditaments mentioned and described in the schedule hereunder written and delineated, &c. belonging or reputed to belong to you, or some or one of you, or in which you, some or one of you, have or claim some estate or interest, are required by the said Company, and are intended to be taken and used for the purposes of the said acts, or one of them; and you are hereby required to deliver to me, or at the office, &c., a statement in writing of the particulars of the estate, share, interest or charge, which you claim to be entitled to, or to be authorized to receive satisfaction and compensation for, of, and in the said lands so required to

be taken and used." The notice went on to state that (under sect. 138 (a)) the parties were required to treat with the Company for the sale &c. of their interests, and for compensation for loss or injury &c., "and you are hereby further required to take notice that, if for the space of twenty-one days next after the service of this notice, you shall neglect or refuse, or shall not agree with the Company for the value, and also for the sale, conveyance and release of your estate and interest, and for the satisfaction, recompence or compensation to be paid for any damage, loss or injury sustained by you or any of you, by reason of the execution of any of the powers by the said acts, or either of them, authorized, or by reason of the severing and dividing of your or any of your land, and also for or on account of any damage, loss or inconvenience which may be sustained by you or any of you, by reason of the taking of the same land and hereditaments for the purposes of the said act, or by reason of the execution of any of the powers of the same act; or if you or any of you shall, by reason of any impediment or disability, whether provided for by the said first-mentioned act or not, be incapable of making such agreement, conveyance or release, as shall be necessary or expedient for enabling the Company to take such lands, or to proceed in making the said railway and other works; or shall not disclose and prove the state of the title to the premises, of which you may be in possession, or of the share, interest or charge which you claim to be entitled to or interested in; or in case an agreement for compensation for the purchase of the said lands cannot be made, then the Company will issue a warrant for the purpose of causing a jury to be summoned, in manner prescribed by the first-mentioned act, for making such inquiry and assessment as is therein specified, and will also take such further proceedings as, under any of the circumstances hereinbefore mentioned, they are by either of the acts empowered to do."

(a) *Pòst*, p. 79.

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A schedule and plan were annexed to the above notice.

Prior to the issuing the warrant after mentioned, the plaintiff did not disclose the state of his title to the messuages, lands, tenements and hereditaments mentioned and referred to in the said notice, or to any part thereof; nor did he agree with the Railway Company for the sale, conveyance or release of his estate and interest therein, or any part thereof, as required by the said notice.

Warrant.

On the 17th January, 1838, the Company issued their warrant under their common seal to the sheriff of the county palatine of Lancaster, in which county the necessary lands, tenements and hereditaments, mentioned in the last-mentioned notice and in the said warrant, are situate, which warrant was in the words and to the effect following, that is to say: "Lancashire to wit. To the sheriff of the county palatine of Lancaster. We, the Manchester and Leeds Railway Company, incorporated by an act of Parliament 6 & 7 Will. 4, intituled &c., do by this our warrant, pursuant to the powers for that purpose given to us by the said act, require you the said sheriff to summon, impanel and return a jury of at least eighteen indifferent men, qualified according to the laws of this realm, to be returned for trials of issues in her Majesty's Courts of Record at Westminster, to be and appear before you the said sheriff at &c., on the 2nd February next &c., in order that you the said sheriff may out of the persons so summoned &c., cause to be sworn twelve, who shall be a jury for the purpose of inquiring of, assessing, and giving a verdict for the sum of money to be paid to the plaintiff, the defendants, and the other persons," (then followed the names mentioned in the notice to treat,) "for the purchase of &c." (Then followed a description of the messuages and premises to be purchased or compensated for, as in the schedule and plan annexed to the notice to treat. There was also a plan in the margin of the warrant, including (amongst

other things) the premises in the declaration and particulars of demand mentioned).

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On the 20th January, 1838, being more than seven days before the holding of the inquisition hereafter mentioned, the Company caused notices of the time and place at which such jury were required to be returned, to be served upon the plaintiff and defendants and the other persons mentioned in the above-mentioned notice to treat, and warrant. The notices commenced thus: "In pursuance of an act, 6 & 7 Will. 4, c. cxi, notice is hereby given you, that a jury, to be summoned, impanelled and returned, according to the provisions of the said act, will come and appear before the sheriff of the county palatine of Lancaster at &c., on the 2nd February, 1838, at the hour of —, for the purpose of inquiring of, assessing and giving a verdict for the sum of money to be paid for the purchase of" &c., (setting out the premises as in the notice to treat and warrant), "when and where you may attend if you please, and when and where you are hereby required to produce all your and each of your grants, leases, or agreements for leases, valuations, rentals, receipts for rent, and other evidences, papers and writings whatsoever, touching or relating to the hereditaments, premises, and matters aforesaid, or any of them."

Notice of inquisition.

Signed by the clerk of the Company.

Annexed to the notice was a plan corresponding with the plan in the margin of the above warrant.

On the 30th January, Mr. Taylor served the clerk of the Company with a protest, denying the right of the Company to take certain parts of the premises mentioned in the notices and warrant, and denying the right of the sheriff to assess the value of such premises, on the ground that they were not sufficiently described in the books of reference, so deposited with the clerks of the peace as aforesaid, or in the schedule annexed to the first-mentioned act, and that the omission in such schedule, so far as related

Protest of plaintiff.

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to the premises in the declaration and particulars of demand mentioned, was not sufficiently corrected by the justices' certificate hereafter mentioned.

At the appointed place and hour on the 2nd February, the jury, who had been summoned by the sheriff for that purpose, attended to assess the value of the premises mentioned in the notices and warrant. The plaintiff, under protest, attended by counsel, but made no other objections to the Company's proceedings. No evidence was then given of the title of the plaintiff or of the other parties to the premises required by the Company. The plaintiff examined witnesses as to the value of the premises, and did not require his interest to be assessed separately from that of the other parties named in the notices, nor were the interests of those parties required to be assessed separately, and thereupon and then and there an inquisition, verdict and judgment was had, taken and given, which inquisition, verdict and judgment was drawn up in writing and signed by the sheriff, and sealed with the seal of office of the said sheriff, and was also signed by and sealed with the seals of the jurors of the jury and each of them, and was forthwith duly deposited with and kept by the clerk of the peace of the county of Lancaster among the records of the quarter sessions of the said county of Lancaster, which inquisition, verdict and judgment, so drawn up in writing, signed, sealed, deposited and kept as aforesaid, was and is to the effect and contained the words following, (amongst others), that is to say:

Inquisition.

"Lancashire, to wit. An inquisition, verdict and judgment, had, taken and given at &c. before me &c. sheriff &c. pursuant to an act of Parliament, 6 & 7 Will. 4, c. cxi, on the oaths of &c. here duly impanelled, summoned and returned by the said sheriff &c. in pursuance of and in obedience to a warrant made and issued under the common seal of the Manchester and Leeds Railway Company to me directed and delivered, and *herunto annexed*, who being

sworn and charged as in and by the said warrant directed, upon their oath present, and say, that they have inquired of, found and assessed, and do find, assess and give this their verdict for the sum of 17,000*l.*, to be paid by the said Manchester and Leeds Railway Company for the purchase of &c. (describing the premises as in the notices and warrant, and including (among other things) all the premises in the declaration and particulars of demand mentioned). And the jurors aforesaid are not required to settle what shares and proportions of the purchase-money and compensation-money aforesaid, by them assessed as aforesaid, should be allowed to any person or persons having a particular estate, term or interest therein. Whereupon I, the said sheriff, in pursuance of the said act of Parliament, do pronounce and give judgment for such purchase-money, so assessed as aforesaid by the said jurors, according to the direction of the said act. In witness whereof I, the said sheriff, have hereunto set my hand and the seal of my office, and the jurors aforesaid have hereunto set their hands and seals, the day and year first above written."

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On the 12th April, the Company, by their clerk, sent a requisition to the plaintiff, calling upon him to shew his title to the said premises.

The plaintiff refused to shew his title, and never made any conveyance of the premises to the Company. He refused also to accept the purchase-money awarded.

On the 30th April, a check or order was drawn by two of the Company's directors on their bankers, and was lodged with them, requiring them to pay to the plaintiff or bearer 17,000*l.*, which sum was directed by a memorandum written upon the face of the check, to be paid into the Bank of England under the direction of the agents of the Company's solicitor. After the check was drawn, the agents of the Company's solicitor procured from the accountant-general of the Court of Exchequer his direction to the Bank of England to receive the 17,000*l.*, which was

Payment of
purchase-mo-
ney.

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thereupon paid by the Company's bankers from the funds of the Company, under the direction of the said agents, and by the orders of the directors of the Company, on the 7th June, into the Bank of England, in the name and with the privity of the accountant-general of the Court of Exchequer, to be placed, and the same was placed, to his account, to the credit of the plaintiff, the defendants, and the other persons above referred to, and all other persons interested in the premises mentioned in the inquisition.

Eviction.

On the 18th June the Company entered upon and took possession of the premises mentioned in the declaration and particulars of demand, together with the other premises in the warrant, inquisition, verdict, and judgment mentioned, and evicted the defendants and their under-tenants from the premises in the declaration and particulars of demand mentioned, the Company claiming title to all the said premises by virtue of the said act of Parliament, warrant, inquisition, verdict, and judgment, payment of money into Court, and other acts and proceedings aforesaid.

The verdict found "that all the lands, messuages and other hereditaments in the notices and warrant of the Manchester and Leeds Railway Company, and in the inquisition mentioned and described, and the value whereof was so assessed as aforesaid, were properly and sufficiently delineated on the plans, and described in the books of reference, deposited with the clerks of the peace as aforesaid.

"That all such of the messuages, lands, tenements, and other hereditaments, in the notices and warrant of the Manchester and Leeds Railway Company mentioned and described, as were required by the first-mentioned act of Parliament to be specified in the schedule thereunto annexed, were properly and sufficiently specified in such schedule, with the exception of the premises mentioned in the declaration and particulars of demand; and with reference to the premises mentioned in the declaration and specified in the particulars of demand, the jurors, &c. find

that the same were wholly omitted in the schedule to the first-mentioned act of Parliament.

"And the jurors aforesaid, upon their oath aforesaid, further find the following facts with respect to the said premises mentioned in the declaration and specified in the particulars of demand, and the situation, description and occupation thereof, that is to say, &c. find that the premises, mentioned in the declaration, and specified in the particulars, are situate on the north-east side of a street called St. George's Street, in Manchester, which leads at right angles from the Oldham Road in a north-westerly direction to St. George's Church.

"That the school-house mentioned in the plaintiff's particulars is a building nearly square, fronting to St. George's Street; and the said school-house was at the time of passing the act of Parliament, and at the time of holding the inquisition aforesaid, in the possession of the Rev. J. White as under-tenant to the defendants.

"That the cellars mentioned in the plaintiff's particulars were under the school-house, and were part and parcel of the same building; and at the time of passing the said act of Parliament the same were in the occupation of R. Fitzgerald and M. Thompson as under tenants.

"That the house mentioned in the plaintiff's particulars adjoins the south-east side of the school-house, and fronts principally towards the south-east; but the offices are built at right-angles to that front, so as to face St. George's Street, and the line of the office is continued by a wall which fences off a yard behind the same.

"That along the north-east side of St. George's Street is built a wall parallel to the said offices and continuing wall before mentioned, and fencing off the house from the street, and the area included, between the south-east front of the house, the front of the offices and continuing wall, and the said other wall built parallel thereto, being in length twenty yards and in width seven yards, had been

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Description of
plaintiff's pre-
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used as a garden ; and behind the offices and adjoining thereto is a yard, containing sixty square yards, of which the south-east wall of the offices, and the continuing wall before mentioned, constitute two sides, and in which yard are the privy and conveniences belonging to the said house.

“ That the only entrance to the house from the street is through a gate, and across the said space of ground to the door in the said wall adjoining St. George’s Street on the south-east front of the house ; and the only entrance to the yard from the street is through the same gate and across the said space, and through a yard door placed in the said continuing wall, which fences off the yard.

“ That the said garden and yard are those mentioned in the amended particulars.

“ That the said house, with the yard and garden, were, at the time of the passing of the first-mentioned act of Parliament, and of the holding the inquisition aforesaid, in the occupation of J. Macfarlane, under the defendants.

“ That the cottage mentioned in the plaintiff’s particulars was situated on the north-west side of the school, and was separated from it by a passage leading from St. George’s Street, and running along the north-west side of the school ; and that the entrance to the cottage was from the said passage ; and that at the time of passing the act of Parliament, and of holding the inquisition aforesaid, the cottage was occupied by J. Swan, under the defendants.

On the 12th and 13th October, 1837, the clerk to the Company served written notices upon the plaintiff, the defendants, and the other persons interested in the premises in the declaration and particulars mentioned, that on the 28th instant application would be made to the magistrates in Salford for a certificate that the last-mentioned premises were omitted by mistake in the schedule of the 6 & 7 Will. 4, c. cxi.

On the 28th October, 1837, application was accordingly made to the said magistrates for such certificate, when the

plaintiff attended by his counsel and attorney, and the magistrates made and issued a certificate under their hands in the following words : — “ We, *S. P. & J. B. &c.*, two &c., acting &c., having carefully inquired into the circumstances, and had good and satisfactory proofs adduced before us of the facts, do hereby, in pursuance and exercise of the power and authority given and granted to us by the 6 & 7 Will. 4, c. cxi, certify that the several tenements, hereditaments and buildings, hereinafter mentioned, and specified in the schedule hereunder written, were by mistake omitted to be inserted in the schedule to the said act of Parliament. And we do further certify, that the several omissions referred to in this our certificate, or in the schedule hereunder written, have proceeded from mistake, and that the said several tenements, buildings, hereditaments and premises, in this our certificate mentioned and referred to, appear to us to be required for the purposes of the said railway, by the said act authorized to be made, and to be within and subject to the powers and authorities in and by the said act given to the Company of proprietors thereby incorporated. As witness,” &c.

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Certificate of
justices.

The Schedule above referred to.

No. on the Plan.	Owners or Reputed Owners.	Lessees.	Occupiers.	Descrip- tion of Property.
25	H. Taylor, Esq. (the plaintiff), an interest therein being claimed by <i>E. T.</i> and <i>J. T.</i>	William Clemson and Joseph Vaughan } the defendants.	John Macfarlane, John Swan, Richard Fitzgerald, Mary Thomson, Rev. James White.	House, Cottage, Two Cellars, and School.

The certificate was deposited with the clerk of the peace on the 1st November, 1837.

On appeal by the plaintiff against the certificate to the Lancashire quarter sessions, on the 16th January, 1838, the certificate was confirmed.

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"And the jurors &c. further find, that the said house, cottage, cellars and school-house, specified in the particulars of demand and mentioned in the declaration, were sufficiently specified in the certificate of the justices of the peace and schedule thereunto annexed.

"That at the time of the passing of the said act, and on the 30th November, 1835, and from thence hitherto, the yard and garden specified in the amended particulars of demand, and being part of the premises in the declaration mentioned, were and have been and still are respectively parcel of and included in the description of the house specified in the schedule to the said certificate, and occupied therewith as such parcel thereof, but whether the same should or should not, according to the true meaning of the said act of Parliament, have been specified in the schedule thereto, or in the certificate of the justices of the peace and schedule thereto, separately and distinctly from the house so specified as aforesaid, of which the jury find the same yard and garden to have been and to be such parcel as aforesaid, and so included in such description as aforesaid, and occupied therewith as aforesaid, the jurors aforesaid are wholly ignorant, and pray the advice," &c.

Deviation.

The verdict then found that the Company had executed a portion of the railway so as to cross lands mentioned in the 59th section of the 6 & 7 Will. 4, c. cxi, therein called the lands of the Bishop of Bristol and J. Livesay; that the railway passes obliquely between streets there called Allen Street and Charles Street, so as to leave a space of twenty-four yards between the railway and Charles Street, but not that space between the railway and Allen Street, a part of which is passed over by the railway. But the verdict also found that the Company had, before making the railway, purchased the whole of the last-mentioned street and the intervening space, and that the fee-simple thereof had vested in the Company, and that this portion of the

railway was made in the line delineated in the deposited plans without any deviation therefrom.

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On this special verdict judgment in the Court of Queen's Bench was entered up for the defendants in error, by consent, without argument.

The case was argued in Michaelmas vacation last (Dec. 8th and 16th), before *Tindal*, C. J., Lord *Abinger*, C. B., *Coltman* and *Maule*, Js., *Parke*, *Alderson* and *Rolfe*, Bs.

Kelly, for the plaintiff in error.—The question is, whether the eviction of the defendants, by the Railway Company, from the premises which they held of the plaintiff, was lawful. If it was not so, that tenancy was not determined, and the legality depends on the question, whether the Company at the time of the eviction, on the facts and proceedings stated in this verdict, had acquired a title.

In this case, the warrant to the sheriff, the inquisition, and the certificate of justices, are all void; inasmuch as they do not shew on the face of them the jurisdiction of the party making them.

First, as to the warrant and inquisition. Sect. 138 (a),

(a) Sect. 138. " And for settling all differences which may arise between the said Company and the several owners and occupiers of or persons interested in any lands, which shall or may be taken, used, damaged, or injuriously affected, by the execution of any of the powers hereby granted, be it further enacted, that if any person, corporation or trustee, so interested or entitled, and incapacitated to sell, agree, convey, or release as aforesaid, or any other person, shall not agree with the said Company as to the amount of such purchase-money, or satisfaction, recompence or other compensation as aforesaid,

or if any of the parties entitled to receive such purchase-money, satisfaction, recompence, or other compensation as aforesaid, shall refuse to accept such purchase-money, satisfaction, recompence, or other compensation as aforesaid, as shall be offered by the said Company, and shall give notice thereof in writing to the said Company within one calendar month next after such offer shall have been made, and the party giving such notice shall therein request that the matter in dispute may be submitted to the determination of a jury, or if any of such parties as aforesaid shall, for the space of

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provides seven cases in which the Company may issue their warrant to the sheriff to summon a jury to assess

twenty-one days next after such notice in writing shall have been given to the clerk, agent or principal officer of any such corporation, or to any of such trustees or persons respectively, or left at his last or usual place of abode, or with the tenant or occupier of any lands required for the purposes of this act, neglect or refuse to treat, or shall not agree with the said Company for the sale, conveyance, and the release of their respective estates or interests, or the respective estates or interests which they respectively are hereby capacitated to convey therein or dispose of, or for the satisfaction, recompence or compensation to be paid to them for any damage, loss or injury whatsoever as aforesaid, or shall by reason of absence be prevented from treating, or shall by reason of any impediment or disability, whether provided for by this act or not, be incapable of making such agreement, conveyance or release, as shall be necessary or expedient for enabling the said Company to take such lands, or to proceed in making the said railway and the other the works aforesaid, or shall not disclose and prove the state of the title to the premises of which they respectively may be in possession, or of the share, interest or charge which they may claim to be entitled unto or interested in, in case they shall be required so to do by the said Company, or in any other case where agreement for compensation for damages in-

curred in the execution of this act, or for the purchase of lands required for the purposes of this act, cannot be made, then and in every such case the said Company shall, and they are hereby required, from time to time to issue a warrant, either under their common seal or under the hands and seals of three at least of the directors of the said Company, to the sheriff of the county in which the lands in question shall be situate, or the matter in dispute shall arise, &c., commanding such sheriff, &c. to impanel, summon and return, and the said sheriff, &c., is hereby accordingly empowered and required to impanel, summon and return a jury, &c., and such jury shall, upon their oath, &c. inquire of and assess, and give a verdict for the sum of money to be paid for the purchase of such lands, (except for such interest therein as shall have been of right purchased by the said Company from any other person), and also the sum of money to be paid by way of satisfaction, recompence or compensation, either for the damages which shall before that time have been done or sustained, or on any other account, or for the future temporary or perpetual, or for any recurring damages, to be so done or sustained as aforesaid, and the cause or occasion of which shall have been in part only obviated, removed or repaired by the said Company, and which cannot or will not be further obviated, removed or repaired

compensation:—1. Where the landowner shall not agree with the Company, as to the amount of purchase-money. 2. Where he shall refuse to accept the purchase-money offered by the Company, and shall give them notice of his refusal one month after their offer. 3. Where after 21 days' notice from the Company, he shall refuse to treat with them. 4. Where after the like notice he shall not agree with them. 5. Where from absence or disability he shall be incapable of agreeing for the purchase. 6. Where he shall not disclose, and prove his title, if required by the Company to do so. 7. In any other case where agreement for purchase cannot be made.

The decisions from the time of Lord *Mansfield*, C. J., to the present all tend to shew, that no documentary proceeding, emanating from an inferior jurisdiction, can be effectual to bind the rights of parties, unless every thing essential to give jurisdiction appears on the face of the proceeding. In *Doe d. Payne v. The Bristol and Exeter Railway Co.* (a), it was objected that the inquisition was void for not setting out that the whole sum had been subscribed,

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by them, and for any other damage, loss or injury as aforesaid; which satisfaction, recompence or compensation for such damage or loss shall be inquired into, and assessed separately and distinctly from the value of the lands so to be taken or used as aforesaid; and the said sheriff &c. shall accordingly give judgment for such purchase-money, satisfaction, recompence or compensation, as shall be assessed by such jury; which said verdict, and the judgment thereon to be pronounced as aforesaid, shall be binding and conclusive, to all intents and purposes, upon all persons and corporations whatsoever: Provided also, that not less than

seven days' notice in writing of the time and place at which such jury are so required to be returned, shall be given by the said Company to the party with whom any such controversy shall arise," &c.

Sect. 140 enacts, "That the said verdicts and judgments, being first signed by the said sheriff &c. presiding at the taking of such verdict and pronouncing such judgment, shall be kept by the clerk of the peace for the county or riding in which the matter in dispute shall have arisen, among the records of the quarter sessions of such county or riding, and shall be deemed records to all intents and purposes." (a) Ante, Vol. 2, p. 75.

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as a preliminary proceeding required by that act to enable the Company to put in force the compulsory powers for taking land. That objection was, not that the inquisition did not state all the facts necessary to its validity by sect. 25 (which authorized the taking of the inquisition and is very similar to the 138th of this act), but that a preliminary fact, unconnected with the subject and provided for by a subsequent section, was not stated. *Regina v. The Trustees of Swansea Harbour* (a), which will probably be relied upon by the defendants here, was there cited to shew that such matters need not be stated, but *Parke, B.*, said, "The sheriff is to give judgment, therefore everything necessary to give him jurisdiction should appear on the face of the inquisition." That inquisition did set out all the antecedent matters necessary to its validity, and therefore was held good. In this case no one is set out; even the warrant is only referred to, and the warrant is open to the same objection, that it does not state the existence of any of the seven cases in which it can be issued. [Lord Abinger, C. B.—There was a compensation case before *Thompson, B.*, where a Company claiming a right to begin, on the ground that they had to prove the antecedent matters on which the jurisdiction of the Judge depended, his Lordship decided that he had no jurisdiction to inquire into such matters, and *Le Blanc, J.*, determined a subsequent case in the same way: both of which decisions were confirmed by the Court of King's Bench.] *Rex v. All Saints, Southampton* (b), shews that the maxim "*omnia præsumuntur rite esse acta*" does not apply to give jurisdiction to inferior courts; and *Day v. King* (c), *Brook v. Jenney* (d), and *Christie v. Unwin* (e), are all authorities to shew that,

(a) 8 Ad. & E. 439; S. C. 1 P. 845.
& D. 512.

(d) 1 G. & D. 567.

(b) 7 B. & C. 785; 1 M. & R. 663.

(e) 11 A. & E. 373; 3 P. & D. 204.

(c) 5 A. & E. 359; 6 N. & M.

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if jurisdiction does not appear upon the face of the proceedings of such limited jurisdictions, the apparent defect is not cured by the appearance or acquiescence of the opposite party, or by proof that the facts on which the jurisdiction is founded really exist. See also *Regina v. The Manchester & Leeds Railway Company (a)*.

There is another objection to the warrant and inquisition, that the latter does not state the certificate of the justices, without which the lands in question, having been omitted in the schedule to the act, could not be taken. There is also an objection, which is confined to the inquisition, that it does not set out the warrant and notice of inquisition. The former the defendants will probably endeavour to get rid of by incorporating the warrant with the inquisition: but that cannot affect the omission of the seven days' notice which the act (sect. 138) requires should be given in writing, of the time and place at which such jury are required to be returned, by the Company or party with whom any controversy shall arise: this the sheriff and jury were surely bound to inquire into; and according to *Rex v. Croke (b)*, it ought to have been fully set out and precisely pursued, and is not waived by appearance. See also the judgment of Lord Mansfield, C. J., in *Rex v. The Mayor &c. of Liverpool (c)*, where an inquisition was quashed for want of notice appearing thereon. And *Rex v. Manning (d)*, and *Rex v. Bagshaw (e)*, shew that the want of such averment is not cured by the fact of notice. In *Rex v. The Committee-Men for the South Holland Drainage (f)*, which may be cited for the defendants, the Court, in the exercise of its discretion, refused a *certiorari*, because the party objecting on the ground of want of notice, had expressly waived it; otherwise, the defect would have been fatal; and *Regina*

(a) 8 Ad. & E. 413; 1 P. & D.

164.

(b) 1 Cowp. 26.

(c) 4 Burr. 2224.

(d) 1 Burr. 377.

(e) 7 T. R. 363.

(f) 8 A. & E. 429; 1 P. & D.

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v. *The Trustees of Swansea Harbour* (a) was decided on the ground, that the trustees made the objection, to set aside their own inquisition, and so take advantage of their own wrong.

II. The certificate of justices is void:—1. By sect. 5 (b), it is only *in case of a dispute* that the justices are empowered to certify that the omission of premises in the schedule proceeded from mistake. The certificate, therefore, ought to state there was a dispute, which is not so stated in this case. 2. Sect. 7 requires that the omission

(a) 8 A. & E. 439; 1 P. & D. 512.

(b) Sect. 5. "Provided always, and be it further enacted, that it shall be lawful for the said Company to make the said railway and other works upon, in, over or through the lands delineated on the said maps or plans, although such lands, or any of them, or the situation thereof respectively, or the name of the owners or of the occupiers thereof respectively, may happen to be omitted, mis-stated, or erroneously described in this act, or in the schedule thereto, or in the said books of reference, if it shall appear to any two or more justices of the peace for the said county palatine of Lancaster, or for the West Riding of the county of York, or for the borough of Leeds (in case of a dispute about the same), and be certified by writing under their hands, that such omission, mis-statement or erroneous description, proceeded from mistake; and the certificate of the said justices shall be deposited with and remain in the custody of the clerk of the peace for the said county palatine of Lan-

caster, or for the said West Riding, or for the said borough of Leeds, as the case may require."

Sect. 7. "Provided also, and be it further enacted, that nothing herein contained shall authorize the said Company, or any person acting under their authority, to take, injure or damage, for the purposes of this act, any house or other building, which was erected or built on or before the 30th day of November, 1835, or any ground which was then set apart and used as and for a garden, orchard, yard, park, paddock, plantation, planted walk or avenue to a house, or any inclosed ground planted as an ornament or shelter to a house, or planted and set apart as a nursery for trees, other than and except such as are specified in the schedule to this act annexed, without the consent in writing of the owner and occupier thereof respectively, unless the omission thereof in such schedule shall have proceeded from mistake, and unless it shall be so certified in manner hereinbefore provided for in cases of unintentional errors in the said book of reference."

of a yard or garden should be certified; and there is no mention of any "yard and garden" in the description of the premises in question in the schedule to the certificate; whereas, being part of those premises, they should be expressly named. 3. By the deviation into Allen-street, they have contravened sect. 59, and have thereby forfeited the compulsory power of taking land. 4. The cheque of the two directors is not a payment of the purchase-money by the Company. [Lord *Abinger*, C. B.—It is a payment by the Company through the two directors who drew the cheque.]

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Cresswell, contra.—It appears by the record, that every thing has been done by the Railway Company required by the statute to complete their title to these premises: the eviction, therefore, of the defendants was lawful; and they are not liable for this claim for use and occupation. It is objected, that the inquisition is void for not stating any of the seven cases, under sect. 138, to authorize the taking of it: and further, that it ought to have stated the certificate of justices and notice of inquisition. The inquisition, referring to the warrant, must be taken to be incorporated with it; and the very circumstance of the warrant being issued shews that there has been a disagreement. There must be two parties concurring to make an agreement, and the Company may be the party disagreeing; in which case, their issuing their warrant would be sufficient proof of the disagreement. They are not bound to make any offer to the landowner first; for, by sect. 143, if they do not, they are to pay the costs of the inquisition.

It was not necessary that the inquisition should state any thing else than the warrant; which, being directed to the sheriff, is the only fact which gives him jurisdiction, and of which he has cognizance. The notice, according to the opinion of *Patteson*, J., in *Rex v. The Trustees of the*

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Norwich and Watton Road (a), should appear on the inquisition, not as the finding of the jury, but in the nature of a *caption*, that is, the history given by a Court of its own proceedings; 1 Stark. Crim. Pl. 233; and, in the case of a Court of record, such history is conclusive, *Basten v. Carew* (b), because it is a record of matters upon which the Court is bound to adjudicate, and it is for not stating such only that the record will be bad. *Kite and Lane's case* (c). In *Rex v. Croke* (d), *Rex v. The Mayor &c. of Liverpool* (e), *Rex v. Bagshaw* (f), and *Rex v. The Trustees of the Norwich and Watton Road* (g), the parties adjudicating had themselves to give the notice. So, in *Day v. King* (h), the omission which made the order bad, was of facts which the parties had to adjudicate upon: if it had stated them it would have been conclusive. The same remark applies to *Christie v. Unwin* (i). In *Rex v. All Saints, Southampton* (k), the examination taken by the justices was not a record, and, therefore, not conclusive of a fact stated in it; otherwise, it would have been so. Moreover, this inquisition cannot be void, or it would have been quashed in *Rex v. The Manchester and Leeds Railway Company* (l); as also the one in *Regina v. The Committee-Men for the South Holland Drainage* (m); and that in *Regina v. The Trustees of Swansea Harbour* (n), which was enforced by *mandamus*. 2. If, therefore, the inquisition is not void, but only erroneous,

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| (a) 5 A. & E. 563; 1 N. & P. | 845. |
| 32. | (i) 11 A. & E. 373; 3 P. & D. |
| (b) 3 B. & C. 649; 5 D. & R. 558. | 204. |
| (c) 1 B. & C. 101; 2 D. & R. | (k) 7 B. & C. 785; 8 M. & R. |
| 212. | 663. |
| (d) 1 Cowp. 26. | (l) 8 A. & E. 413; 1 P. & D. |
| (e) 4 Burr. 2244. | 164. |
| (f) 7 T. R. 363. | (m) 8 A. & E. 429; 1 P. & D. |
| (g) 5 A. & E. 563; 1 N. & P. | 79. |
| 32. | (n) 8 A. & E. 439; 1 P. & D. |
| (h) 5 A. & E. 359; 6 N. & M. | 512. |

it is good till set aside. The distinction between void and erroneous proceedings is said, in *The Marshalsea case* (a), to be, whether a Court has or has not jurisdiction of the cause. See also *Turner v. Felgate* (b), *Barker v. Bramham* (c), *Parsons v. Lloyd* (d), and *Philips v. Biron* (e). If the plaintiff in this case had brought an action of trespass against the Company for entering his land, and they had pleaded specially, they would have been obliged to aver and prove all the facts necessary to give the sheriff jurisdiction; and then the inquisition would have protected them. See *Trevor v. Wall* (f), *Evans v. Munkley* (g). It would be useless, therefore, to state such preliminary facts in the inquisition, which would not be evidence of them, as they would have to be averred and proved in any proceedings. The inquisition, too, however erroneous, as long as it remains a judgment, is, by sect. 138, binding and conclusive, to all intents and purposes, upon all persons whatsoever.

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II. As to the objections to the certificate:—1. That it does not state that there was any dispute as to the omission of the premises from the schedule being by mistake. The answer is, that, if there is no dispute, the certificate is unnecessary; if a dispute is necessary, in case of a mistake being admitted, the schedule could not be amended. 2. It is found that the yard and garden are parcel of, and included in, the description of the house, and occupied with it, not detached, and, therefore, would pass as part of it. *Plowd.* 171; *Bettesworth's case* (h); *Co. Litt.* 5. b., 56. b.

The deviation is authorized by sect. 59, if the verdict had not found that there was no deviation from the parlia-

(a) 10 Rep. 68, b.

(b) 1 Lev. 95.

(c) 3 Wils. 368.

(d) 3 Wils. 341.

(e) 1 Str. 509.

(f) 1 T. R. 151.

(g) 4 Taunt. 48.

(h) 2 Rep. 32.

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mentary line. The Company have purchased the whole of Allen-street, instead of the one side required by sect. 59.

The objection as to the payment of the purchase-money has been answered by the Court.

Ellis, in reply.—*Rex v. The Mayor &c. of Liverpool* (a) and *Rex v. Croke* (b) shew that it is no answer, to the objection that the inquisition does not state the notice, to say, that such notice is an antecedent act, with which the sheriff has nothing to do. It is impossible, from this inquisition, to ascertain on which of the cases, in sect. 138, the sheriff and jury have proceeded. They had, themselves, no jurisdiction; and, therefore, a statement of the preliminary facts was necessary to shew they were a court at all. The proceedings would otherwise appear to be *coràm non judice*, and so *void*; which might have been in *Basten v. Carew* (c), and the other cases cited on that point.

If, then, it does not appear that the court itself existed, the distinction drawn from the *Marshalsea case* (d), as to voidable and void proceedings, does not apply.

Besides, it was necessary to set out the inquisition, because, without it, the special verdict contains no finding that the sheriff gave any judgment; nor would any other mode of finding the judgment be good, as it may be collected from sect. 140, that it is to be in writing, as in *The Earl of Harborough v. Shardlow* (e).

Lastly, the payment stated is insufficient and might have been repudiated by the Company. The money, by sect. 160, must be paid into the Bank of England "as thereinbefore recited" (by sect. 153). That direction is, that the Company may *order* such payment; and by sect. 218,

(a) 4 Burr. 2244.

(b) 1 Cowp. 26.

(c) 3 B. & C. 649; 5 D. & R. 558.

(d) 10 Rep. 68, b.

(e) Ante, Vol. 2, p. 253.

all orders are to be in writing, and entered in a book. This does not appear, from the verdict, to have been done in this case: the money, therefore, may have been paid without authority, and be recoverable by the Company.

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Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the Court:—The question raised for the opinion of the Court below, upon this special verdict, was, whether the defendants below ceased to be tenants to the plaintiff below by the entry and eviction of the Manchester and Leeds Railway Company, under the powers and authority of the act 6 & 7 Will. 4, c. cxi; for, if such entry and eviction was justified by the powers given by the act, then the defendants paid into Court more than was due for their use and occupation of the plaintiff's premises, and the judgment given for such defendants by the Court below ought to stand; but, if such entry and eviction was not justified, then the defendants still continued tenants notwithstanding the eviction, and are liable to a further sum for use and occupation beyond what was paid into Court, and in that case the judgment must be given for the plaintiff below.

On the part of the plaintiff, three principal grounds of objection against the validity of the proceedings of the Railway Company have been raised, and relied upon in argument; viz.

1. That the warrant and inquisition directed by the 138th section of the act do not state upon the face of them sufficient facts to shew any jurisdiction over the subject-matter, and that consequently such warrant and inquisition, and the judgment also of the sheriff founded thereon, are altogether void. 2. That the certificate granted by the two justices under the 5th section of the act, upon the ground of an unintentional error having taken place in the description of the premises in the schedule to the act of

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Parliament, is void, by reason of its not stating that there was any dispute. And 3. Because the yard and garden, parcel of the premises, are neither specified in the original schedule nor in the certificate.

Of these objections the first is that which is entitled to the greatest consideration. The authority given by the statute to the Railway Company, to take the lands of individuals for the purposes of the act, where it is exercised adversely and not by consent, is undoubtedly an authority to be carried into effect by means unknown to the common law. And it is therefore contended, on the part of the plaintiff, that the same rule will apply to these proceedings, which is held to apply to all other inferior jurisdictions—that, unless sufficient appears upon the face of the proceedings themselves to shew the jurisdiction exists, such proceedings are altogether void. Admitting such to be the rule of law, and not further relying on the special finding by the jury, that all which was necessary to give jurisdiction under the statute did really and in fact take place, than to observe, that the whole objection is confined to the face of the proceedings themselves, the question is, whether, expressly or by necessary intendment, the proceedings do of themselves shew that they were warranted by the statute. And we are of opinion that, upon fair and necessary intendment, the jurisdiction appears upon the proceedings themselves.

The warrant and inquisition being annexed together, as stated in the special verdict, may be considered as one entire proceeding, and any deficiency existing in the one may be aided by reference to the other. And indeed it is obvious that, as no particular form is prescribed by the statute, it must be sufficient if the jurisdiction is substantially made apparent upon the face of the documents, or is to be inferred therefrom.

Now it is to be observed that the statute in section 138 enumerates the several cases in which power is given to

the Company to ascertain the amount or value of the purchase-money of lands to be taken under the act, by the intervention of a jury; and, after specifying three distinct cases, viz. first, mere simple non-agreement as to the purchase-money, secondly, the refusal to accept the purchase-money, with notice and request that it may be referred to a jury, and thirdly, a neglect or refusal after notice to treat or agree for the sale, or an incapacity to make an agreement, or non-disclosure of the state of the title of the seller, the section concludes with this very general and comprehensive statement,—“or in any other case where agreement for the purchase of lands required for the purposes of the act cannot be made.” And we think the very circumstance of recourse having been taken by the Company to the compulsory means of ascertaining the amount of the purchase-money by summoning the jury, and the proceeding to judgment in the regular mode pointed out by the statute, afford the natural and necessary inference that a previous agreement for the purchase could not be made. Such indeed appears to have been the opinion of *Littledale* and *Williams, Js.*, in the case of *Reg. v. Trustees of Swansea Harbour (a)*, which in its circumstances strongly resembles the present. The warrant states, upon the face of it, that it was issued by the Company pursuant to the powers for that purpose given to them by the act: the jury are directed upon the face of the warrant to be impanelled, “to inquire of, assess and give a verdict for the sum of money to be paid to the plaintiff (amongst others) for the purchase of the lands, &c. (amongst others) of the plaintiff, about to be purchased and taken under the authority of the act;” words which imply necessarily, that such purchase had not then been completed, that *no sale* had been then agreed on, the terms *purchase* and *sale* being correlative terms, and not being satisfied, unless a

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(a) 8 A. & E. 439; 1 P. & D. 512.

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price had been agreed on between the parties. And again, in the inquisition, after the jury have ascertained and settled the amount, it proceeds thus: "I the said sheriff, in pursuance of the said act, do pronounce and give judgment for such purchase money, so assessed by the jurors, according to the direction of the said act;"—words which import in themselves, that the settling the amount of the purchase-money is a proceeding between adverse parties, a proceeding *in invitum*, and not the result of a preceding agreement.

And, if the cases relied upon on the part of the plaintiff are examined, they will all be found distinguishable from the present in this material point, that the omission, or want of averment on the face of the proceedings, which formed the objection in those cases, could not be supplied by any intendment from the facts stated in the instrument itself, or from the fact that the order or instrument itself was made.

Thus, in the case of *Rex v. Manning* (a), the objection was, that it did not appear in the order "that there were no proper materials in or upon the wastes or common grounds in any place near the highway." In the case of *Rex v. The Mayor &c. of Liverpool* (b) the objection was, that the service of previous notice ought to have appeared upon the inquisition in order to give jurisdiction. In *Rex v. Croke* (c) the objection was, that it did not appear on the order that the mayor, aldermen and commons, in common council assembled, had adjudged the lands to be necessary; nor did it appear on the order that the defendant had had notice in writing. In *Rex v. Bagshaw and others* (d) the objection was again the want of notice to the defendant, which was essential to give the trustees jurisdiction. In the case of *Day v. King and others* (e) the order was defi-

(a) 1 Burr. 377.

(b) 4 Burr. 2244.

(c) 1 Cowp. 26.

(d) 7 T. R. 363.

(e) 5 A. & E. 359; 6 N. & M. 845.

cient in stating the party for whom the order was made to be a member of the Friendly Society. But in each of these cases, and in the others cited, it is obvious that it could not be contended, from the fact of the proceeding under the statute having taken place, that there had been a performance of the act or condition precedent, the omission to allege which performance on the face of the proceedings formed the ground of objection. As, for instance, the proceedings under the Highway Act, in the case of *Rex v. Manning (a)*, furnished no inference whatever as to the non-existence of materials near the highway; and so of the rest. Here, on the contrary, it appears to us that it is impossible, upon reading the warrant and inquisition, to arrive at any other conclusion than this, that the Company must have proceeded on the ground that no agreement could be previously made.

There was a further objection to the inquisition, that no mention of the certificate appears therein. But we think it is a sufficient answer to this objection, that the effect of the certificate is simply to rectify the mistake or omission in the schedule to the act itself, and to extend the operation of the statute to the several lands, &c. included in the certificate, so as to place them precisely in the same situation as if they had been inserted in the original schedule of the act.

The other objections appear to us to possess less weight and difficulty. For, as to the certificate, it is objected that it does not set forth the grounds on which it was granted. But this objection to the certificate is virtually the same as that which has been already considered with regard to the warrant and inquisition. The only necessity for any certificate is, as stated in sect. 5, "in case of a dispute" as to any error in the description of lands &c. in the schedule. There is no previous condition to be performed by the

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(a) 1 Burr. 377.

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Company or any other person, in order to give jurisdiction to the certifying justices. They are to make their certificate in case of a dispute: and the fact of their being applied to, and granting their certificate, is not merely evidence of the dispute, but appears to be part of the very dispute itself.

And as to the third objection, that the garden and yard are not mentioned in the certificate or schedule thereto, which forms an objection as well to the certificate as also an objection to the authority of the Company to enter upon the same under the warrant and inquisition, it is to be observed that this objection is not one that is confined to the form of the certificate or the schedule thereto, but is in part a question of fact, viz. whether upon the evidence the yard and garden were included within the description of the house specified in the schedule to the certificate; and upon this point the finding of the jury is express, that "at the time of passing the act and thence hitherto, the yard and garden were parcel of and included in the description of the said house specified in the schedule to the said certificate, and occupied therewith as such parcel thereof; and upon such finding we think there is no objection in point of law that the yard and garden should pass. The authority in Co. Lit. 5. b. is express, that, by the grant of a messuage *or* house, the garden, orchard and curtilage do pass.

There was indeed one objection, raised in the course of the argument, but not much insisted upon, that the Company had deviated from the line authorized by the act, by coming within the prescribed distance from a newly laid-out street, called Allen-street. We mention it only that it may not be considered as overlooked; for we think the answer given at the bar was quite satisfactory, that the Company had purchased the land constituting the newly laid-out street and the railway.

We therefore think, notwithstanding the various objec-

tions which have been taken, the defendants below, on the finding of this special verdict, were entitled to the judgment of the Court; and, therefore, that the judgment of the Court below must be affirmed.

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Judgment affirmed.

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BILL stated that, by an act of Parliament, 5 Will. 4, c. xiii, intituled "An Act for making and maintaining a Pier, and other works, at Deptford, in the county of Kent," it was, among other things, enacted, that certain persons therein named or referred to should be one body politic and corporate, by the name of the Deptford Pier and Improvement Company, and by that name should have perpetual succession and a common seal, and by that name should and might sue and be sued, and should have full power and authority to purchase and hold lands, tenements, and hereditaments to them, their successors, and assigns, for the use of the said undertaking, without incurring any of the forfeitures of the statutes of mortmain; and the said Company were authorized to raise among themselves a sum of £50,000, to be divided into 2500 shares of £20 each,

The Deptford Pier Company having contracted for the purchase of certain lands, applied to W. T. P. to lend them the money to complete their contract, which he accordingly did. The conveyances were made to W. T. P., by way of mortgage, for securing the repayment of the sum advanced, and subject thereto in trust for the Company. W. T. P. afterwards obtained judg-

ment, and was about to get possession under an elegit. The mortgagees of the "tolls, rates, and duties," who had advanced monies to the Company, on the security of certain mortgage debentures issued by the Company, in conformity with a power contained in the 16th section of their act, filed their bill against the mortgagees of the land, for the purpose of having the priority of such debentures declared, and praying an injunction and receiver:—*Held*, upon demurrer, that the plaintiffs were right in using the powers the law gave them, and that there was no equity in the mortgagees of the tolls, rates and duties, as against the mortgagees of the land. Demurrer allowed with costs.

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and also to raise a further sum not exceeding £25,000 by debentures upon the credit of the said undertaking (a).

(a) Sect. 16. "And be it further enacted, that in case the said Company shall be desirous of raising by debentures upon the credit of the said undertaking, a further sum, not exceeding the sum of £25,000, and shall make an order or enter into a resolution to that effect, at any general or special general meeting of the said Company to be called for that purpose, then, and in such case, it shall be lawful for the directors of the said Company, pursuant to such order or resolution, to borrow or take up at interest any sum or sums of money, not exceeding in the whole the sum of £25,000, or any part thereof, upon the credit of the said undertaking, as to them shall seem meet and convenient, and the said directors are hereby accordingly fully authorized and empowered to assign over by way of mortgage, to any person lending any such money, the several tolls, rates, and duties to be under and by virtue of this act or any part thereof, (the costs and charges of which assignments shall be paid out of the said tolls, rates, and duties), as a security for the sum of money so to be borrowed, together with interest for the same, unto the person who shall lend and advance any such sum of money for the use of the said Company, or unto his trustee, all which assignments and mortgages shall be made by deed in writing under the common seal of the said Company, in the form or to the following effect:—' By virtue of an act passed &c., intituled

&c., we, the Deptford Pier and Improvement Company, incorporated by virtue of the said act, in consideration of the sum of of lawful money of Great Britain to us paid by , do hereby assign unto the said his [or her] executors, administrators, and assigns, the said undertaking, and all and singular the tolls, rates, and duties granted, or arising and payable to us by virtue of the said act, and all the estate, right, title, and inheritance of us the said Company, of, in, to, or out of the same respectively, to hold unto the said his [or her] executors, administrators, and assigns, until the said sum of together with interest for the same, after the rate of per cent. per annum, shall be fully paid and satisfied to him or her. Given under our common seal this day of .'
And all persons to whom any such mortgage shall be made shall be equally entitled, one with the other, to the said tolls, rates, duties, and premises hereby assigned, according and in proportion to the sums by them respectively lent and advanced on the credit thereof as aforesaid, without any preference by reason of priority of the date of any such assignment or mortgage, or upon any other account whatsoever; and the money so to be borrowed as aforesaid, shall be applied and disposed of for or towards the carrying the intents and purposes of this act into execution, and a memorial of every such mortgage,

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That under the powers of their act the directors of the said Company raised considerable sums of money by the issue of shares in the said Company, and by payments made thereon; and the proprietors thereof and the directors expended a great part of such money in the purchase of lands and hereditaments for the purposes of the said undertaking, which lands and hereditaments were still in their possession; and the Company had partly completed their undertaking by constructing a pier, which was then and had for some time been in use for the public, and they had under the powers of their act fixed certain tolls, rates, and duties which were then payable in respect thereof.

That several of the holders of shares neglected to pay their calls, and the shares were declared forfeited; but none of such shares were ever resold, and a great loss was thereby occasioned to the Company.

That the defendant H. B. Leeson was, at and prior to the passing of the first-mentioned act, possessed of, or interested in certain lands and hereditaments, which were required by the Company for the purposes of the undertaking, and was a director of the said Company.

That in the year 1836, and while H. B. L. was a director of the Company, several negotiations between him and the Company took place respecting the lands and hereditaments of the said H. B. L., which were required by the Company, and certain agreements or alleged agreements were entered into between them, and several entries relating thereto were made in the minute books of the Company, but the said Company did, in the year 1836 or 1837, repudiate such agreements or alleged agreements, and about that time a suit was commenced in this Court

containing the date and name of the person to whom made, the sum of money borrowed, and the rate of interest, shall be entered in a book to be kept by the clerk to the said Company, or such other person as the directors thereof for the time being shall appoint.

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by H. B. L. against the Company for the purpose of enforcing the alleged agreements, and various proceedings were had therein.

That an agreement was ultimately come to between H. B. L. and the Company respecting the said lands and hereditaments, under which H. B. L. gave up to the Company the possession of the same lands and hereditaments, and the same had ever since been and then were in the possession of the said Company, but the purchase-money thereof had not been paid by the Company.

That the said Company entered into several contracts or agreements for the purchase of certain lands and hereditaments required by them for the purposes of their undertaking, but not being able to pay the purchase-money for the same, they applied to and requested the defendant, W. T. Pritchard, to advance them the monies necessary to complete such contracts and agreements, and said W. T. P. paid to several parties who had agreed to sell said lands and hereditaments, the amount of their purchase-monies respectively, and a conveyance of such lands and hereditaments was thereupon made to said W. T. P., by way of mortgage, for securing the repayment to him of the monies so lent and advanced by him, and subject thereto in trust for the Company.

That plaintiff C. Perkins, in the year 1836, supplied a great quantity of iron to the Company for the purpose of their undertaking, and for the construction of the pier by their act authorized to be made, and the Company thereby became indebted to the said C. P. to a considerable amount, and that, in order to give plaintiff some security for the payment of the money so due to him, the said Company executed and delivered to plaintiff four several and similar deeds, (all in the form prescribed by the 16th section) (a), by each of which they assigned to the said C.

(a) Ante, p. 96.

P., his executors, administrators, and assigns, "the said undertaking, and all and singular the tolls, rates, and duties granted or arising or payable to us by virtue of the said act," redeemable on payment of £2000 and interest, three months' previous notice to be given of the intention to pay off this security, but "the same shall not be paid off before the 1st day of October, 1844."

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That in December, 1837, the said Company obtained advances from M. Attwood and J. Twells their bankers, and executed four similar deeds for £500 each, in favour of the said M. A. and J. T.

That the Company did not, under the powers of their act or otherwise, grant or issue any other mortgages than the said five mortgages, which were held by plaintiffs.

That all the monies due upon the said mortgages were then due, together with an arrear of interest thereon.

That the affairs of the said Company became greatly embarrassed, and that said H. B. L. and W. T. P., colluding with the directors of the Company, and with a view of unfairly prejudicing the claim of plaintiffs as such mortgagees, entered into an agreement, that the debt due from the Company to the said H. B. Leeson should be deemed to be the first claim upon the property of the Company, and should be first satisfied and discharged, and that the said W. T. P. should in the next place receive the whole of the debt due to him from the Company, or that such debts should be paid subject only to the lien of the solicitor of the Company upon the deeds or papers of the said Company.

That in furtherance of such scheme as aforesaid, and with the said design of unfairly postponing the claim of plaintiffs, each of them, the said H. B. L. and W. T. P., had brought an action at law against the said Company for the monies due to them respectively as aforesaid, and that neither of such actions was defended by the said Company, and that H. B. L. and W. T. P. respectively obtained

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judgments in the said actions for the amounts so due to them, together with interest and costs, which exceeded the sum of £10,000 and £13,000 respectively.

That a bill was introduced on behalf of the said Company into the House of Commons, the nature whereof, when before the committee, was entirely changed, and clauses were introduced, the effect whereof was to enable the directors of the said Company to sell the lands and hereditaments of the said Company, and out of the proceeds to pay certain of their creditors, in such manner and according to such priority, that the plaintiffs would altogether lose the monies due to them from the Company, unless the said lands and hereditaments should be sold for a very considerable sum.

That the said clauses were so introduced with a view to give H. B. L. and W. T. P. an unfair preference and priority over the other creditors of the said Company, and to enable them to obtain payment in full of their several debts, without regard to the fact whether there should or should not be sufficient means to satisfy any of the other creditors of the said Company, and in particular with a view to deprive the plaintiffs of the priority to which they were entitled by virtue of their said respective mortgages.

[The bill then stated various communications with the parties on the subject of the bill before Parliament, and that a petition was presented to the House of Commons praying that the said bill might be recommitted, and that the plaintiffs might be heard against the same, and that the House of Commons was pleased to grant the said petition, and the bill was recommitted accordingly, and when it was discussed before the committee, certain clauses were inserted in the said bill which authorized the sale of the lands and hereditaments of the said Company and the abandonment of the said undertaking, but the clause which directed the application of the proceeds was struck out, and the bill so altered was passed into an act.]

And the bill charged that the plaintiffs accepted the debentures or mortgages upon the faith that the undertaking would be proceeded with, and that the rates, tolls, and duties received therefrom would be applied in payment of the interest due on account thereof, and that the directors of the said Company ought not to abandon and give up their undertaking, without making due provision for the payment of the monies thereby charged upon it.

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That by means of such debentures or mortgages the plaintiffs acquired, and still have, the first charge upon all the lands and hereditaments which had been conveyed to the Company, and that if the same, or any part thereof, were sold, the proceeds arising therefrom ought to be applied, in the first instance, in the discharge of the monies due to the plaintiffs and the holders of said debentures or mortgages, and that by such means as aforesaid they also acquired an equitable lien upon all the lands and hereditaments which had been conveyed to or were then vested in W. T. P., or any other party or parties as a trustee or trustees for the Company, subject only to the payment out of the proceeds arising from the sale of such last-mentioned lands and hereditaments of the monies specifically secured thereon.

That an agreement had been entered into and still existed between the said H. B. L. and W. T. P. and the said Company, that the said H. B. L. should be first paid his debts in full, and that the said W. T. P. should next be paid in full, or that the said H. B. L. and W. T. P. should be paid subject only to the lien of the solicitor of the Company upon the papers, deeds, and documents of the said Company, and that the said H. B. L. and W. T. P. respectively threatened and intended, unless prevented by the injunction of this Court, to sue out execution upon their respective judgments, to obtain a writ of elegit, and put the sheriff into possession for their own benefit

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of all the lands, tenements, and hereditaments of the Company, or compel the Company to give up possession thereof.

That a great part of the lands, tenements, and hereditaments in the possession of the Company were unnecessary, and were not required for the purposes of the said act and undertaking, and might and ought to be sold, and the proceeds thereof applied in discharge of the debts due from the Company, so far as the same would extend.

That the Company intended under the powers either of the first-mentioned act, or of the last-mentioned bill, in case the same should be passed into a law, to sell all, or the greater part of their lands, tenements, and hereditaments, and apply the proceeds thereof in payment of the debts of the Company, without any regard to the due priority thereof, and in particular to pay and discharge the debts due to said H. B. L. and W. T. P. in full in the first instance.

And the bill prayed that the priorities of the plaintiffs and of the said H. B. L. and W. T. P., as creditors of said Company, might be declared, and that it might be declared that the plaintiffs were the first incumbrancers upon all the lands, &c., which had been conveyed to the Company. And also that they were entitled to an equitable lien upon all lands, tenements, and hereditaments, if any, which were then vested in any other person or persons as trustee or trustees on behalf of the said Company, subject only to any specific charges or incumbrances, if any, affecting the same. And that an account might be taken under the direction of the Court, of what was due to the plaintiffs, or to any other parties, if any, who had priority over the plaintiffs as creditors of the said Company. And that an inquiry might be directed by the Court as to whether any, and, if any, what part of the lands, tenements, and hereditaments then in possession of the Company, or con-

veyed to any trustee or trustees for them, might be sold without injury or damage to said undertaking, and that the same might be sold accordingly, under the direction of the Court, and a receiver might be appointed to receive and get in all rents, issues, and profits, rates, tolls, and duties arising from any lands, tenements, or hereditaments belonging to the said Company, or from the said undertaking, or receivable by the said Company or in their behalf, and that all monies which might arise from a sale of any of the lands, tenements, and hereditaments of the said Company might be paid into Court, and that such rents, issues, and profits, rates, tolls, duties, and monies as aforesaid, might be applied in the discharge of the debts due from the said Company, according to the priority of such debts, or that, at all events, the order in which plaintiffs were entitled to stand, as creditors of the said Company, may be declared by the Court. And that the said H. B. Leeson and W. T. Pritchard might be respectively restrained by injunction from suing out execution against the said Company upon their said judgment or either of them, or taking any other steps in connection therewith or founded thereon, to disturb or interrupt the possession by the said Company of any of the lands, tenements, and hereditaments then in their possession, and that the said Company and directors thereof might also be restrained, by the injunction of this Honourable Court, from doing any act which would unfairly prejudice the claim or priority of the plaintiffs, as such mortgagees as aforesaid.

To this bill the defendant Pritchard put in a demurrer, on the grounds of want of equity, misjoinder, multifariousness, and want of parties; but the case was decided on the ground of want of equity only.

Mr. *Wilcock*, in support of the demurrer.—The plaintiffs are attempting to become incumbrancers on the whole

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of the property of the Company, and to prevent the defendants from using their legal remedies: *Whitworth v. Gaugain* (a).

Mr. *Wakefield*, and Mr. *Twells*, in support of the bill.—The plaintiffs are protected by the 16th section of the act and are the whole class included in that section, as there are no other holders of debentures. The defendants by entering on the land take away the security given by the act of Parliament, and though we have no right to the land, we are, at all events, entitled to the tolls, rates, and duties assigned to us. The defendants cannot be justified in taking away from us that to which we are entitled in priority to any other persons, and which must, under any circumstances, continue to be a security for the money advanced. Our legal remedy does not accrue in respect of the debentures, until October 1844: *Doe d. Myatt v. St. Helen's and Runcorn Gap Railway Co.* (b), *Hodges v. Croydon Canal Company* (c), *Mellish v. Brooks* (d), *Pontet v. Basingstoke Canal Company* (e).

THE VICE-CHANCELLOR.—I do not understand how the plaintiffs have any sort of claim or right upon the property of the Company, except upon the debentures. The act of Parliament authorizes the Company to raise money by mortgage, in a given form, and, as I understand it by the bill, the debentures which have been taken are in the form of the act. The words of the act are, “that in case the said Company shall be desirous of raising by debentures upon the credit of the said undertaking, a farther sum not exceeding the sum of £25,000, and shall make an order or enter into a resolution to that effect, at any general

(a) 1 Cr. & Ph. 525.

(d) *Id.* 22.

(b) *Ante*, Vol. 2, p. 756; S. C.
 1 G. & D. 663.

(e) 3 Bing. N. C. 433; 2 Scott,
 543.

(c) 3 Beav. 86.

or special general meeting of the said Company to be called for that purpose, then and in such case it shall be lawful for the directors of the said Company, pursuant to such order or resolution, to borrow or take up at interest any sum or sums of money, not exceeding in the whole the sum of £25,000, or any part thereof, upon the credit of the said undertaking, as to them shall seem meet and convenient, and the said directors are hereby accordingly fully authorized and empowered to assign over by way of mortgage, to any person lending any such money, the several tolls, rates, and duties to be raised under and by virtue of this act or any part thereof." But the act says nothing about raising money by mortgage of the lands.

The transaction with Pritchard seems to be this:—The Company being desirous to purchase lands were not able to advance the money to complete the contract, and therefore applied to Pritchard to lend them the money. They pay the vendors, and then conveyances were made to Pritchard, by way of mortgage, for securing repayment to him, and subject thereto in trust for the Company. Then it is stated, that the Company purchased other lands, but I do not understand that the plaintiffs have thought it right to take any security other than this security given by the act upon the rates, tolls, and duties.

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Then it is said there has been a sort of collusion between Pritchard, Leeson, and the Company, which is exemplified by the fact, that they duly brought actions against the Company for the money due to them from the Company, and each of them has recovered judgment at law. I cannot in the least comprehend how this Court is to interfere with actions which were perfectly right and fair; and supposing the directors and Pritchard and Leeson met together, and the former had said, "Your mortgages are not sufficient, you had better bring actions against us and recover judgment, but take out execution on any property you can make available," where is the dishonesty in that?

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If the plaintiffs really meant to have security upon the lands of the Company they might have had it, but they file a bill because they have a lien on the rates, tolls, and duties, and they say there could not be tolls if there were no lands, and these wicked persons who first of all be-thought themselves of taking a mortgage on the lands, might, by taking the lands, prevent them from taking the rates, tolls, and duties. Suppose they did, they were only using the powers they lawfully might use. There is no equity for the plaintiffs in that respect, and the plaintiffs have no right whatever to the lands in mortgage, or which are subject to the judgments of Pritchard and Leeson, except such as is to be inferred from the circuitous way in which the plaintiffs have taken debentures on the tolls. Therefore, on the general ground, I allow the demurrer.

COURT OF CHANCERY.

SIR J. L. K. BRUCE, V. C.

Nov. 12. STORER v. THE GREAT WESTERN RAILWAY COMPANY AND
 G. H. GIBBS, R. F. GOWER, AND RALPH FENWICK,
 Defendants.

By an inden-
 ture of agree-
 ment entered
 into by the de-
 fendants with
 the plaintiff, the defendants covenanted "that they would construct and for ever thereafter main-
 tain one neat archway, sufficient to permit a loaded carriage of hay to pass under the railway, at
 such place as the plaintiff, his heirs and assigns, should think most convenient in his pleasure
 grounds, and should form and complete the approaches to such archway." The defendants
 having neglected to comply with the plaintiff's request to fulfil the covenant, a bill was filed to
 compel a specific performance.

BILL filed 2nd June, 1841, stated the act of Parlia-
 ment incorporating the Company under the style of "The

Held, that the Court will interfere for the purpose of directing the specific performance of a
 contract by defendants to do defined work on their own property, in the performance of which
 the plaintiff, with whom they have covenanted, has an interest so material that the non-perform-
 ance cannot be adequately compensated by damages at law.

Great Western Railway Company," and that certain persons were appointed directors; and that by the said act it was enacted that all contracts and agreements in writing relating to the affairs of the said Company, which should be signed by three of the directors of the said Company, should be binding on the said Company and all other parties thereto, their respective successors, &c.; and that actions and suits might be maintained thereon, and damages and costs recovered by or against the said Company, and any of the other parties thereto failing in the execution thereof, with various other provisions.

That in the year 1837 the said Company applied to Parliament for power to alter their line and amend their former acts of Parliament.

That previously to 1837 the plaintiff was seised in fee of a mansion-house, park, and lands near Penley in Berks, and that the line of railway was intended to pass across and through the said park and lands.

That plaintiff opposed the bill, and thereupon overtures were made on the part of the Company, and an agreement bearing date the 24th April, 1837, was duly signed and executed by the defendants G. H. G., R. F. G., and R. F., both as directors, and in behalf of, and so as to bind the said Company, and also themselves personally and individually, and was also signed and executed by the plaintiff, and thereby it was covenanted, amongst other things, that the Company, before taking possession of the lands of plaintiff required for the purpose of making their railway, should pay to him 10,000*l.* for the purchase-money of such land as should be necessary for the foundation of their line of railway through his said property, commencing at &c.; and that the width of the land so to be taken should be only what might be sufficient for the purpose of making the embankment and cuttings with the necessary fences thereto, and for making the foundations of the abutments of any bridge or arch to be built for carrying the railway across,

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over, or under the public roads in the neighbourhood, and to the west of the said mansion-house or of any accommodation bridge or arch on the property and for the use of the plaintiff, and for forming the approaches to the said bridges or arches; the land to be taken for the purpose of such public road and approaches not to exceed ten yards in width on either side of such road, and that the sum of 10,000*l.* and the other sums of money therein mentioned, and the stipulations therein contained, when they should have been complied with by the Company, should by the plaintiff be accepted in satisfaction for damages occasioned by the railway being made, and for the purchase of the fee simple and inheritance of the said land and the severance of the estate of the plaintiff, and that the works of the Company and the land of the plaintiff to be taken or used by the Company should be confined within such limits, and that the level of the railway should be such as therein in that behalf were respectively mentioned; and that no buildings, sheds, outhouses, depôts, wharfs, or storehouses should be made, set up, or erected, on any part of the lands of the plaintiff taken by the Company, nor should any arches made on the lands of the plaintiff taken by the Company be converted into dwelling or other houses, or used for any purpose whatsoever; and that the Company should provide all requisite fences and pay 200*l.* for a fishing-house as therein mentioned; and that the Company should construct and for ever thereafter maintain one neat archway sufficient to permit a loaded carriage of hay to pass under the railway at such place as the plaintiff, his heirs or assigns, should think most convenient in his pleasure grounds, and should form and complete the approaches to such archway, but the said Company should not be required to make any other bridge or archway in the pleasure grounds of the plaintiff, unless by the formation of the railway near the fishing cottage the Company should cut off the said plaintiff from access to his land between the rail-

way and the river, in which case the Company should and would, at their option, either construct and ever after maintain, in addition to the before-mentioned bridge or archway, a neat archway under, or bridge over the said railway with the necessary approaches thereto of at least eight feet in height, and not less than five feet in breadth; or pay to him at the rate of 50*l.* per acre for the land so cut off and lying between the railway and the river as and for the damage done to him by such severance, the land remaining the property of the plaintiff; and that if the plaintiff, his heirs or assigns, should consider it necessary to have any further communication or bridges on the farm lands belonging to the plaintiff in addition to the bridges and archways before mentioned, by reason of any of the fields belonging to the plaintiff not having access sufficient in an agricultural point of view by reason of their size or otherwise, it should be referred to such persons, as in the indenture are described in that behalf, to determine whether such bridges could be reasonably required, and if, upon such reference, it should be considered that any such bridges could be reasonably required, the said Company at their expense should make and for ever maintain the same, and should also pay all the expense of and attending such reference. And that the purchase of the premises of the plaintiff which were to be taken by the Company should be completed, and the purchase-money paid, and possession given within six months from the passing of said bill; but inasmuch as the said plaintiff only agreed for and in respect of his own interest in the said premises, and did not agree that any act or deed should be done or performed by his tenants therein named, or any other person whomsoever, except the said plaintiff and other persons claiming under or in trust for him, it was thereby agreed and declared that, if the said tenants should not deliver up possession of the said premises within the time specified, or afterward, to the Company, the said agreement with the

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plaintiff should in nowise be affected thereby, and that the Company should pay to the plaintiff such costs and expenses as therein mentioned, relating to the opposition to the said bill, and the said agreement, and the making out and establishing his title to the premises to be taken as aforesaid, and all other the usual vendor's expenses attending the conveyance of the said premises; and that the said Company should not be at liberty to excavate (except for the necessary drains running parallel thereto) any land of the plaintiff beyond the base of the embankment or the top of the slope in the cuttings; and that the Company should make compensation to the tenants of the plaintiff in addition to the compensation payable to the plaintiff as aforesaid, and that, if required by the plaintiff, his heirs or assigns, the now stating indenture should be ratified by and at the expense of the Company by an instrument under their common seal to be executed after the said proposed bill should have passed into a law; and if, within six months after the passing of the said bill authorizing the said railway to be made and maintained across the property of plaintiff in manner aforesaid, the said directors, parties thereto, should cause to be delivered to the plaintiff or to his solicitor or agent in this matter an agreement or instrument under the common seal of the Company, ratifying the now-stating indenture, and entering into several covenants and agreements on the part of the said Company with those by the now-stating indenture entered into by the said directors, then the now-stating indenture should, so far as the same operated to bind the said directors personally, and their respective heirs, executors and administrators, cease and determine; and in consideration of the covenants therein contained, the plaintiff agreed to withdraw all his opposition to the bill in Parliament and to give his assent thereto, and to the said proposed line, and to concur in and abide by the determination made on such reference as aforesaid, and at the ex-

pense of the said Company to execute conveyances and to do all other acts which might be reasonably required for the purpose of carrying the said indenture into full effect; and it was thereby agreed that the said agreement should be considered binding and obligatory on both parties thereto, and on the said Company, although there might be any inconsistency or apparent inconsistency between the provision therein contained and the provision that might be contained in such bill of the said Company as should pass into a law. And it was distinctly agreed that the said Company should derive no right, as against the plaintiff or any person claiming under or in trust for him, to enter upon or hold the lands belonging to the plaintiff under the authority of the said act until all the stipulations therein contained on the part of the said Company, which were from their nature at the time capable of being complied with, and should not have been prevented by the acts of the plaintiff, should have been complied with and fulfilled, excepting only for the purpose of making out and measuring the ground to be taken for the said railway.

That the plaintiff, relying on the said agreement, withdrew his opposition to the said bill, which became an act of Parliament.

That the said agreement was approved of and adopted by the said Company.

That the Company had entered upon the plaintiff's land, and constructed their railway across the same, and that the plaintiff had duly conveyed the same to the said Company.

That the plaintiff had, on his part, in all respects performed the said agreement, and observed the terms of the said agreement, and that the Company had in part performed the same, but in many important particulars the Company had failed and refused to perform the said agreement on their part, and to observe and perform the covenants contained therein.

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That the plaintiff applied to the Company to make such archway as was covenanted to be made and the approaches thereto, and indicated and gave due and sufficient notice of the place at which he then and still thought it most convenient and desirable that the same should be built. That, in consequence thereof, on the 18th of December, 1838, the surveyor and agent of the Company met the plaintiff, who then and there pointed out the precise place at which he desired the archway to be constructed.

That the Company refused to comply with the plaintiff's applications. And the bill prayed, that it might be declared that the said agreement and indenture were binding on the said Company, and also personally on the said other defendants; and that the said Company and other defendants might be decreed specifically to perform the said agreement, and the covenants and stipulations of the said indenture, so far as the same remained unperformed; and that the said Company might be decreed forthwith to make and construct and for ever thereafter to maintain a neat archway, sufficient to permit a loaded carriage of hay to pass under the said railway, at the place the plaintiff thought most convenient and desired in his pleasure grounds aforesaid, and to form complete, proper, and convenient approaches to such archway, and that in all other respects the said Company and the said other defendants might do, perform, and pay, and cause to be done, performed, and paid all acts, matters, things, and monies which, according to the said agreement and the due intent and meaning thereof, should at any time and from time to time remain, and be to be done, performed, and paid, or to be required by the plaintiff, his heirs or assigns, to be done, performed, and paid, for the full and complete performance and carrying into effect of the said agreement and indenture, and that all proper and necessary orders and directions might be made and given for effectuating the purposes aforesaid.

The defendants, the Great Western Railway Company,

by their answer, after admitting the several statements in the bill, stated they were unable to set forth with certainty whether they had had conveyed to them as much land as was required for the purposes mentioned in the said agreement, for they said that if the plaintiff should insist upon an archway under the said railway being made, as prayed by his bill, more land would probably be required for that purpose; and they denied that they had refused to perform the said agreement, or that the plaintiff at any time pointed out or gave notice or information to the surveyor, of the place at which he thought it most convenient that the archway should be constructed; and that they had been always ready and willing to make and construct an archway under the said railway on the plaintiff's selecting the place at which the same was to be made, and giving due notice thereof.

The statements in the bill as to the meeting and notice were proved by the depositions on the part of the plaintiff; and although there was no positive refusal on the part of the Company to comply with the plaintiff's request, yet they entirely neglected to carry his wishes into effect. The defence adopted by the defendants was that the plaintiff had mistaken his remedy by coming to a court of equity, and that his proper and only course was to proceed by action at law.

Mr. Wigram and Mr. Bazalgette, for the plaintiff.—Although a court of equity will not decree the specific performance of an agreement to build when the terms are not sufficiently defined, or where the plaintiff can procure complete satisfaction by the damages to be recovered by an action at law, yet where a party has covenanted to do a certain act on his own land, which covenant is clearly and distinctly defined, and in which the plaintiff is materially interested, and that too in a case where damages cannot give complete satisfaction, such a covenant would be decreed

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to be specifically performed. The cases in note to *Gordon v. Gordon* (a), and also *Flint v. Brandon* (b); *Lane v. Newdigate* (c); *Franklin v. Tuton* (d); *Rankin v. Huskisson* (e), were cited.

Mr. Cooper, with whom was Mr. Stevens—

Courts of equity will not, at the present day, enforce specific performance of an agreement to build or of covenants similar to the one entered into by the Company with the plaintiff. The plaintiff's only remedy is by action at law. *Booth v. Pollard* (g); *Lord Henley on Injunctions*, p. 12.

The Company are ready and willing to act in whatever way the Court shall think proper, and to withdraw all opposition, if it shall be of opinion that this covenant can be enforced.

VICE-CHANCELLOR K. BRUCE.—The course which the argument has taken at the conclusion, and the very able observations I have heard, render it unnecessary for me to give that further consideration to the authorities cited on the point in question, which, if the matter had been adversely contested to the last on the question of jurisdiction, I should have thought it right to do; considering, however, the course which the argument has latterly taken, I think that I may, on the information which I now possess, venture to act on the opinion which I have formed. My opinion is, that, consistently with the principles on which *Flint v. Brandon* (b) was decided, (with which case I entirely agree), it is competent to, and the duty of, this Court to interfere for the purpose of directing the specific performance of a contract by a defendant to do defined work upon his own property, in the performance of which the plaintiff,

(a) 3 Swanst. 400.

(b) 8 Ves. 159.

(c) 10 Ves. 192.

(d) 5 Madd. 469.

(e) 4 Sim. 13.

(g) 4 You. & C. 61.

with whom he has covenanted, has a material interest,—an interest so material that the non-performance is not capable of adequate compensation by damages : such in my opinion is the present case. The Company, having purchased a strip of land bounded on each side by land of the plaintiff, contracted that they would make him a communication of a certain ascertained kind through the land thus acquired by them, in order to enable carriages of a given description to pass from his land on one side to his land on the other. The Company have acquired that portion of the plaintiff's estate upon that faith and under that contract, and they are now throwing difficulties in the way of performing it ; why, it does not very plainly appear, at least on the pleadings in this cause. It appears to me, therefore, that damages for the non-performance of such a contract, especially considering the proximity of the mansion-house and the demesnes attached to it, would be anything but an adequate compensation, and that the plaintiff has a right to come here for the specific thing contracted for, and that it is competent to this Court to direct that the work required by the covenant shall be done. Much has been said in argument as to the difficulty of the superintendence by the Court, by means of the Master or otherwise, of the performance of such a work : now, what the Court is required to do is, to order that the thing shall be done, and it is competent to the plaintiff to come here afterwards alleging that the thing has not been done ; and then, the question whether the thing has been done or not, is as capable of solution as any other matter of fact that could be decided ; and if it shall appear that the defendants have not obeyed the order of the Court, such a course will be taken as is adopted in all other cases of disobedience to its orders. Though, therefore, this is not to be considered as such a judgment as I should have given after all the deliberation and examination which I should have bestowed on the subject had the argument of the defendants at the bar latterly taken a

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different course, yet certainly my present opinion is so formed, that under the circumstances of this case I will now venture to act upon it. Therefore, let it be declared, in the language of the instrument, that the defendants (the Company) are bound specifically to perform the covenant by making the archway, and let them be ordered to make it. They must, however, have a reasonable time to make it in.

The minutes were as follows :—

Declare that the defendants, the Great Western Railway Company, are bound specifically to perform the covenant “forthwith, &c.,” and order that the said Company do, within a reasonable time, form and construct such archway and approaches as aforesaid, according to the said covenant, at such place as aforesaid, being the place mentioned in the depositions of the witness E. S. to have been fixed on by the plaintiff for the purpose, with liberty for the defendants to apply in case of the refusal of the plaintiff to afford reasonable facilities in his power for enabling the said Company to form and construct the same or otherwise; and with liberty for the plaintiff to apply in case of delay on the part of the defendants or otherwise. Let the bill be dismissed as against the three other defendants, and order their costs and all costs of the plaintiff up to the present time, including the costs incurred by and in consequence of making the three other defendants parties, to be paid by the defendants, the Company. Reserve further directions and costs.

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BEFORE SIR J. WIGRAM, V. C.

Ex parte GARDINER, re THE EASTERN COUNTIES RAILWAY
COMPANY.

THIS was a petition presented for the purpose of getting a sum of money, part of the purchase-money of lands sold to the Eastern Counties Railway, which had been reserved in Court to meet contested claims, paid out to the petitioner; and also for the costs of the application.

Mr. *Stratton*, for the petitioner.

Mr. *Roupell*, for the Railway Company.

On the part of the Railway Company it was contended, that, as the fund was reserved in Court for the benefit of the vendors, it did not come within the (a) 48th section of the Eastern Counties Railway Act (6 & 7 Will. 4, c. cvi.), and that the Company were not therefore liable to pay the costs of the petition.

May.

Where part of the purchase-money remained in Court to await the decision of contested claims, the Eastern Counties Railway Company were, under the 48th section (a) of their act, held liable to pay the costs of the application of the person rightly entitled to have the money paid to him.

(c) Section 48 enacts—"That where by reason of any disability or incapacity of any party entitled to any lands to be taken or used, or in respect of which any satisfaction, recompense, or compensation shall be required to be paid into the Bank of England, it shall be lawful for the said Court to order the costs, charges, and expenses attending the purchase or the taking or using of such lands, or which may be incurred in consequence thereof, and of the re-investment of the purchase or compensation money in other

land, or so much of such several costs, charges, and expenses as the said Court shall deem reasonable, and likewise the costs, charges, and expenses (occasioned only by the passing of this act, and not by litigation between claimants or otherwise) paid as hereinbefore authorized for the investment of such purchase or compensation money in government or real securities, and for the payment of the interest and dividends thereof, and of such government or real securities, or of the money to be produced by the sale

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WIGRAM, V. C.—The 48th section of the act gives the Court power to order the reasonable costs of the parties, incurred in procuring the payment of their purchase-money out of Court, to be paid by the Company. The question here has arisen in consequence of the state of the property,—a state in which the parties had a right to place it. It is clear that the Court has jurisdiction to order the costs to be paid; and it is the duty of the Court to give the costs, unless a special case is made out; otherwise, the party has his estate diminished by its being taken from him by the Company against his will. The Company, however, are not to pay the costs of a party who claims and turns out not to be entitled to the fund; yet the Company must pay the costs of all persons who properly claim and are entitled to the fund, that is, the costs and charges properly incurred.

thereof out of Court, together with the necessary costs and charges of obtaining the proper orders for such purposes, to be paid by the said Company out of the money to be received by virtue of this act; and the said Company shall from time to time pay such sum of money for such costs, charges, and expenses as the said Court shall direct. And also that when in any other cases the purchase-money for any lands to be taken or used under the authority of this act, or any monies payable for any satisfaction, recompense, or compensation under this act, shall, by reason of or under any of the pro-

visions of this act, be paid into the Bank of England, &c., it shall likewise be lawful for the said Court to order the reasonable expenses of any party or parties, in procuring the same to be paid out of Court, together with the necessary costs and charges of obtaining the proper orders for such purposes, to be in like manner paid by the said Company out of the monies to be received by virtue of this act, and the said Company accordingly shall from time to time pay such sums of money, and in such manner and for such purposes, as the said Court shall direct."

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Ex parte The TRUSTEES of JOHN ADDEY's Charity, in re
THE LONDON AND GREENWICH RAILWAY COMPANY,

May 29.

THE petition prayed for a reference to the Master to tax the costs, charges, and expenses incurred by the petitioners upon and in relation to the contract with, and sale and conveyance to, the Railway Company, of the hereditaments purchased and taken by the said Company, and in making out the petitioner's title to the parts of the charitable estate so purchased and taken by the said Company, &c.

The facts material to this case, and the argument of counsel, are set out in the judgment.

Mr. *Stratton* appeared for the petitioners.

Mr. *Twells*, for the Railway Company.

By the London and Greenwich Railway Act it was provided, "that all such contracts, sales, and conveyances, shall be made at the expense of the Company:"—*Held*, that the expenses of the vendors, in making out their title to the land sold to the Railway Company, were included in the words "contracts, sales, and conveyances."

June 2.

WIGRAM, V. C.—The question in this case arises under the act of Parliament (a), by which the Railway Company were empowered to purchase lands of persons otherwise incapacitated, who were thereby empowered to sell and convey to the Company; and the act prescribes the way in which the price of the land is to be ascertained, and directs "that all such contracts, sales, and conveyances shall be made at the expense of the Company." Now, in this case, the Railway Company did contract with the petitioners for the purchase of part of their lands, and the price was fixed by a jury, and the conveyance executed; and the only question is this:—The Company, having taken the land, called on the vendors, as they had a right to do, to make out their title. The title was made out, and some expenses were incurred in so doing. The sole question before me has

(a) 3 Will. 4, c. xlv.

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been, whether the vendors are entitled to the costs of making out their title to the land. The Company admit they are bound to pay the costs of the re-investment of the purchase-money. The argument was divided into two points. First, it was said that the words "contracts, sales, and conveyances" do not comprehend the costs of making out the title; and secondly, that, if it were doubtful, a subsequent act (a) which had been passed was so worded as to comprehend the particular costs in question; and therefore, this act would not be held to have included the costs which were expressly provided for by the subsequent act. I do not at all accede to the second point of the argument. The first act was very loosely worded, and it was necessary to extend its provisions in several ways; but if these words in the first act are large enough to comprise the costs, the subsequent act cannot have the effect of depriving the vendors of the costs they have incurred in making out their title. The sole question is, whether the words of the first act are large enough to cover the costs of making out the title. I con-

(a) 3 & 4 Vict. c. cxxviii. s. 15
—"That all the reasonable costs, charges, and expenses which shall be incurred or sustained by any person or persons selling any lands, tenements, or hereditaments, or any estate or interest therein, to the said Company; and also all the costs, charges, or expenses on the part as well of the seller as of the purchaser of all conveyances and assurances of any lands, tenements, or hereditaments which shall be purchased or taken by the said Company, or any term, estate, or interest therein, and of deducing, evidencing, and verifying such title as the said Company may require, to the said lands, tenements, or hereditaments, or any term, estate,

or interest therein, and of making out and furnishing such abstract and such attested copies as the said Company may require, and all the expenses whatsoever incident to the investigation, deduction, and verification of such title, shall be borne and paid by the said Company; and the said Company before entering into possession of the lands, tenements, or hereditaments so purchased or taken, shall pay the amount of such costs, charges, and expenses, or in case there shall be any dispute about the same, then such costs, charges, and expenses shall be ascertained, settled, and determined as therein mentioned.

less it seems to me clear that they are. If the word "contracts" alone had been used, that would have been large enough to cover the costs in question. If there was a contract, and it was part of the contract that the costs of the contract should be paid by the purchasers, the word "contract" would cover the costs in question. If such a question arose between the parties, and if a bill were filed, no doubt a Court of Equity would say, if the purchasers agreed to pay all expenses of the contract, they must pay these costs also. But supposing there to be any doubt, what is the effect of the words "sales and conveyances?" When the contract was made, the parties contemplated there would be some expense in making out the title; but they say the vendors should pay the expense of this. This would be a contradiction of the terms "expenses of the contract, sale, and conveyance," which comprise every expense necessarily incidental to them, and which are to be paid by the purchaser.

Ordered as prayed.

BEFORE THE MASTER OF THE ROLLS.

THE SHEFFIELD CANAL COMPANY v. THE SHEFFIELD
AND ROTHERHAM RAILWAY COMPANY.

1841. 1842.
1843.
Nov. 1841.

BILL filed in January, and amended in August, 1839, stated, that by the Sheffield Canal Act (55 Geo. 3), after reciting that the River Dun Navigation Company were liable, at their own costs and charges, to uphold and repair a good road from the wharf, where the navigation ended, to Lady's Bridge (called the Wicker), and to take certain tolls for goods; and that the consequences of the comple-

Where an agreement has been commenced by letter, but in the course of the treaty an offer, made by letter, has been verbally rejected:—*Held*, that the party who has made

the offer is relieved from his liability unless he consent to renew the treaty.

The party who has rejected the offer cannot afterwards at his own option convert the same offer into an agreement by acceptance, without a renewed offer from the other party.

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tion of the Canal would be to deprive the said Dun Navigation Company of their revenue: It was enacted, that the Canal Company should first purchase the rights of the Dun Navigation Company, and the tolls, and should also take upon themselves the liability of keeping up the said road called "the Wicker."

That the Sheffield Canal Company purchased the rights of the Dun River Navigation Company, and the same were effectually conveyed to the Canal Company.

That, in 1835, the projectors of the Sheffield and Rotherham Railway Company endeavoured to obtain an act of Parliament to enable them to make their railway, and when the bill was passing through the House of Commons, the Canal Company procured a clause to be inserted, whereby it was enacted that the said Railway Company should, after the railway had been completed and opened, pay to the Canal Company the annual sum of £100 for maintaining the said road called "the Wicker."

That the bill passed the House of Commons, but was rejected in the House of Lords; and the said projectors, in 1836, caused another bill to be introduced into the House of Commons, which was passed without the clause as to "the Wicker." The bill passed through two readings in the House of Lords, and on the third, a petition for liberty to be heard against the bill was presented by the Canal Company. The petition was referred to the Committee to which the Railway Bill was referred, and they were of opinion that the Canal Company were entitled to an indemnity from the Railway Company, and a private arrangement was recommended, in order to avoid endangering the bill, by the insertion of a clause which would be a money clause.

That B. J. Wake, the clerk of the Canal Company, and Badger & Vickers, on the part of the Railway Company, were authorized by the respective Companies to carry out the recommendation of the House of Lords, whereupon

the Canal Company withdrew their opposition to the bill, and the same passed into an act on the 4th July, 1836.

The bill then stated a correspondence which took place between the several persons authorized to act on behalf of their respective Companies, (the material letters are stated at length in the judgment).

The bill (among other things) charged a report of the Committee of the Canal Company of the 28th July, 1836, wherein the correspondence hereinbefore referred to was treated as a positive agreement for the investment of so much money as would produce £100 per annum for the repair of "the Wicker;" and that Badger was present at the meeting at which the report was read, and did not dissent, and that a printed copy was sent to him, and that the existence and contents of such report were known to several directors of the said Railway Company.

That the letters amounted to an agreement, and also charged the possession of books, papers, &c., in the usual manner. The form of the interrogatories to the last-mentioned charge was as follows:—

"Whether the said Railway Company or their law clerks, or one or which of their law clerks, or some and what other persons or person on their behalf, have not or has not now or had not lately and when last in their or his possession, custody, or power divers or some and what books or book, papers or paper, minutes or memorandums of their proceedings, and of matters brought before them relating to the said railway, and divers or some and what letters or letter, copies or copy of letters or letter, drafts or draft of letters or letter, extracts or extract from letters or letter, and other papers or writings, and in particular the letters of the said B. J. Wake, and a printed copy of the report of the 28th day of July, 1836, relating to the matters hereinbefore stated or some of them, or from which such matters or some of them would appear, and that the said Railway Company might produce all such books, papers and writings

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for the usual purposes, and might in their answer set forth a full and complete schedule thereof."

And the bill prayed that the said Sheffield and Rotherham Railway Company might be decreed specifically to perform their said agreement with the company of proprietors of the Sheffield Canal (according to the true intent and meaning of such agreement as contained in the letters thereinbefore set forth), and in particular that the said Railway Company might be directed to invest a sufficient sum of money in Government securities or as the Court should direct in trust to secure the due payment of the annual sum of £100 by half-yearly payments to the said Canal Company for the purposes mentioned in the said agreement, and that the said Canal Company might be permitted to receive the same, the said Canal Company thereby offering to perform the said agreement on their part, &c.

The defendants by their answer admitted the possession of books, letters and copies of letters mentioned in the schedule to which they referred, but insisted that they were not bound to part with the books as they related to the concerns of the Company, and, save as by their answer and the schedule appeared, they traversed and denied the rest of the interrogatory.

The only description of the books in the schedule annexed to the answer was—"4 Books."

To this answer the plaintiffs excepted, whereupon the defendants put in a further answer, wherein the names or titles of the several books, and the letters or marks whereby they were known, were set forth; but they relied on the objection taken by their former answer as to the production thereof. And they further said that by means of the said schedule and of their further answer, they had set forth a full and complete schedule of all such books, papers and writings as in any manner related to the matters in the said bill mentioned or any or either of them, which were

then or had been in the possession, custody or power of the defendants.

The plaintiffs obtained an order to inspect the several books &c. mentioned in the defendants' answer, but the defendants or their law clerks were given liberty to seal up such parts of the said books as according to an affidavit made by the said law clerk did not relate to the company of proprietors of the Sheffield Canal, or the matters in question in the cause.

Badger and Vickers by affidavit severally made oath and said, that such parts as were sealed up from view of the several books mentioned in the schedule to the defendants' answer did not relate to the Company of Proprietors of the Sheffield Canal, or to the matters in question in the cause.

The cause came on for hearing.

Mr. Kindersley and *Mr. Parker*, for the plaintiffs.

Mr. Pemberton and *Mr. Bacon*, for the defendants.

THE MASTER OF THE ROLLS.—The plaintiffs by the form of their bill found their title to relief on the allegation that the trusts therein set forth constitute a binding agreement, and the defendants insist that the letters, having regard to the circumstances under which they were written, do not constitute an agreement; the real question in this cause is, whether there is such an agreement as the plaintiffs allege, or not. In the year 1835, an application was made to Parliament to incorporate the Sheffield and Rotherham Railway Company for a purpose, the completion of which was contrary to the interest of the plaintiffs, the Sheffield Canal Company, and the bill passed the House of Commons with a clause of indemnity providing for the payment of the annual sum of £100 by the intended Railway Company for the plaintiffs.

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The bill being lost in the House of Lords, an application for a like bill was introduced into the House of Commons in the year 1836, and in that year it was passed in the House of Commons without any clause for the indemnity of the plaintiffs; whilst the bill was under the consideration of the committee of the House of Lords, it was opposed by the plaintiffs, and the committee, or some of the members of the committee, recommended that the differences between the plaintiffs and the party promoting the bill should be settled by private arrangement; and an opportunity for making such arrangement was afforded. Messrs. Badger & Vickers acted as the solicitors for the promoters of the bill; Mr. Wake was the clerk and law agent of the plaintiffs. And after the recommendation which the parties had received, Mr. Vickers wrote to Mr. Wake as follows:—

“ Sheffield and Rotherham Railway,
 “ 18th June, 1836.

“ In compliance with the recommendation of the committee of the House of Lords on that bill, advising some arrangements to be come to between the parties as to a contribution towards the expenses of repairing the Wicker, that is to say, the portion of road lying between the Sheffield terminus of the Railway and Lady’s Bridge, I, as one of the solicitors of the Railway Company, undertake that the directors shall enter into a contract to pay to the Sheffield Canal Company £100 per annum by equal half-yearly payments, the first payment to be made at the expiration of half a year from the completion and opening of the railway, the same to be applied by the Canal Company exclusively towards the repair of “the Wicker,” between the aforesaid points, such contract to contain a proviso that if the legislature shall at some time relieve the Canal Company from the burthen of the repairs of the road from Tinsley’s Wharf to Lady’s Bridge, or should authorize the taking of a toll thereon, that then and from

thenceforth the said annual payment, and all right to recover the same under the said intended contract, shall wholly cease and determine.

(Signed) "HENRY VICKERS."

"As none of the directors are now in London, I will, if you require it, make myself personally responsible by agreement on stamp for the payment of the money until the contract can be executed by the directors.

"HENRY VICKERS."

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This letter was a proposal for an agreement, and no more; and it appears from the evidence, that in the evening of the same day on which the letter was written an interview took place between Mr. Vickers and Mr. Wake, and Mr. Wake then rejected the proposal: he objected to it on three grounds:—First, that the annual payment was proposed to be determinable, and not perpetual; secondly, that the proposal was to apply the annual payment exclusively to the repairs of a part of the road, and not as the plaintiffs thought proper; and thirdly, that the proposal was to make the annual payment without securing it by an investment. Mr. Wake insisted on those objections, and Mr. Vickers having refused to obviate them, the meeting ended without any agreement being entered into, and Mr. Wake said he would oppose the bringing up of the report of the committee of the House of Lords. It would seem that, on reflection, Mr. Wake considered that he had broken off the treaty somewhat too hastily; for on the 20th of June, 1836, after an attempt to communicate verbally through a message which was declined, Mr. Wake wrote to Mr. Vickers a letter dated 20th June, 1836:—

"Dear Sir—For the reasons I named to you, I submit that the matter must be arranged by investment in the manner that I suggested, and the trust would be, that the payment should be continued for ever, with a proviso that

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if the Railroad Company extended their railway into the town, or they should be joined by any other, so that the reason for the payment ceased, then that the payment should cease also. This would be consistent with my doctrine, as an advocate for the Tinsley railroad bill, and, though it may be inconsistent with yours, as an advocate against it, I have no doubt you will now recognise the justice of it. Pray let this matter be arranged to-day, as I want to go out of town. I will be at the Bedford or Old Hummums at two o'clock, for the purpose of seeing you if you wish it."

By this letter the negotiation, which had been broken off by Mr. Wake on the Saturday, was attempted to be renewed by him on the following Monday. Messrs. Badger & Vickers seem to have been very willing to renew the treaty, and they answered Mr. Wake's letter as follows:—

" Monday, June 20th.

" Dear Sir,—We have no objection to meet your views, by investing a sum of money in the funds sufficient to raise the annual sum proposed, accompanied by a declaration of trust to the purport and subject to the provisos mentioned in our proposition of Saturday, 18th inst. The annual payment to cease in either of the events therein alluded to, and the sum invested to be then applicable to the general purposes of the Railway Company. Until a contract to effect that arrangement can be prepared and executed by the directors, we undertake to hold ourselves personally responsible."

Thus the question as to investment was conceded to Mr. Wake, but Messrs. Badger & Vickers still insisted on their own views of the other matters in difference, viz. the question relating to the cesser of the annuity, and the application of it. The treaty was however at that time by

mutual consent renewed, and it might have led to a favourable conclusion, but the solicitors met at two o'clock on the same day, and at that meeting Mr. Wake still insisted on the annual payments being made perpetual; and he also required that the proposed investment should actually be made before the bill was proceeded with, and on this an entire disagreement between the parties ensued. This is evident even from an entry made by Mr. Wake in his diary of the 20th June, 1836, which is as follows:—

“Wrote to Henry Vickers requiring investments; afterwards received note from him with engagement to invest; then had an interview with him and Badger; he accused me of breaking an engagement with him, and I refused to accept his engagement, stating for one reason, that it was quite as possible that he should break any engagement, as that I should. Ultimately I stated that I required investment and declaration of trust on the principle and terms of the clause of last year, and that, if it were not granted, I should oppose the report and third reading.” This entry appears to me to shew distinctly that no agreement was come to at the time it was written. Mr. Wake refused to accept the engagement which was part of the offer of Messrs. Badger & Vickers, and he required an investment and declaration of trust on the principle and terms of the clause of 1835, to which principle and terms Messrs. Badger & Vickers never agreed. Moreover the entry shews a statement by Mr. Wake, that if the terms were not agreed to, (which they never were), he would oppose the report and second reading. The entry is perfectly consistent with the other evidence in the cause, which shews that the meeting ended by the two solicitors setting each other at defiance. Mr. Wake said he would get two persons, whom he named, to stop the report from being brought up; and Mr. Vickers, on his part, answering that on their side they would not delay it, and that there was an end to all treaty and arrangement, stated that they would bring up the

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report that night. Under these circumstances, it is, I think, apparent, that, at the time Mr. Wake and Mr. Vickers separated on the 20th June, not only no agreement was concluded, but the treaty for an agreement was broken off, and neither party was bound by a proposal or offer previously made. Mr. Wake, indeed, seems to have supposed very soon afterwards that the treaty still continued, and considered that Messrs. Badger & Vickers were bound to wait till he had consulted Lord Wharnccliffe as to whether he was to yield the points for which he had contended, and accept the proposals made to him on the part of the promoters of the bill; and in his evidence Mr. Wake has stated, that he did not hear Messrs. Badgers & Vickers tell him that they intended to bring up the report that evening, that they did not say so, and that he did distinctly tell them that he would see Lord Wharnccliffe the first thing in the morning, and would write to him as soon as he should have seen him. Now considering the whole evidence, I think Mr. Wake could hardly have understood the import of his own expression or the effect of his own conduct; that there was no agreement, I think is clear; that Messrs. B. & V. agreed to wait till Mr. Wake consulted Lord Wharnccliffe is no where even asserted; and there is satisfactory evidence that the avowed object of Mr. Wake in going to Lord Wharnccliffe was to procure his Lordship to oppose the further progress of the bill. Under these circumstances, and according to the intention they had avowed, Messrs. B. & V. procured the report of the Lords' Committee to be brought up the same night: there was no opposition, and for that reason Messrs. B. & V. might have supposed that Mr. Wake had altered his intention, which was very improbable, or had neglected, or had not been able, to procure an opposition. Mr. Wake had said that he would see two peers, Lord —, and Lord Wharnccliffe, to prevent the bringing up of the report. The statement on the bill is, that on the point,

whether the investment to secure the payment of the annuity should actually be made before the bill proceeded to a third reading, Mr. Wake said he would consult Lord Wharnccliffe; whatever his motive was, he did call on Lord Wharnccliffe on the morning of the 21st of June; and after the interview he wrote to Messrs. B. & V. as follows:—

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"I have had an interview this morning with Lord Wharnccliffe on the subject of your letter to me of yesterday's date, and the document of the 18th instant, to which it refers, and, yielding to his Lordship's opinion, I, on behalf of the Sheffield Canal Company, accept the engagement on the terms of the two documents.

"I am, dear Sir, yours truly,

"BERNARD JOHN WAKE."

It is extremely singular that in this letter Mr. Wake should take no notice of the meeting of the preceding day, and I think still more singular, considering the importance of the subject, that he did not make it his business to see Messrs. B. & V. without delay, and make sure of renewing the treaty and concluding the agreement, when he was willing to agree to their terms. However, he sent his letter, proceeded to attend to other business, abandoned all opposition to the bill, and seems to have thought that a binding agreement had been concluded. There is no very great certainty as to the time when the last letter of Mr. Wake was received by Messrs. B. & V., and it is quite plain that the witnesses for the defendants have been under very considerable misapprehension as to the time at which the proceedings on the bill took place. On the 21st June, the promoters of the bill appear to have had good reason to consider that they, on the one hand, and Mr. Wake, for the plaintiffs, on the other hand, had abandoned all hope of coming to an arrangement of the matters in differ-

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ence. They conceived themselves to be, as I think they were, at liberty to promote the bill by all fair and regular means, and had reason to expect the opposition which the plaintiffs were no doubt fully at liberty to make. But, on the 21st June, after they had received Mr. Wake's letter, they might have known that he was acting on a mistaken reliance that there was a subsisting agreement, and therefore have had reason to suppose that the withdrawal of the opposition was owing to that error. What consideration might have been due to that, and several other circumstances, strongly urged in argument, it is not now necessary to consider. The bill does not ask relief on any such ground, but merely relies on the agreement, and asks relief on the ground that the agreement was actually concluded, and asks for a specific performance of that agreement. An agreement may undoubtedly be constituted by letters: but if, in the course of the treaty, an offer made by letter is verbally rejected, the party who makes it is relieved from his liability on that offer, unless he consent to renew the treaty on the same footing; the party who has rejected the offer cannot afterwards, at his own option, convert the same offer into an agreement by acceptance; for that purpose he must have the renewed consent of the party who made the offer. In this case, Mr. Wake having, on the 18th June, 1836, rejected the offer made by Mr. Vickers on the same day, was not, at his own option, entitled to hold Mr. Vickers to it on the 20th June, but on that day Mr. Vickers, having received Mr. Wake's letter, consented to renew the treaty, having conceded one point only to Mr. Wake, and he refused the offer of Mr. Wake as to the rest. If this had been accepted, as it might have been, and Mr. Wake was subsequently willing to accept it, there would have been a binding agreement; but Mr. Wake rejected this offer, and after rejecting the offer he is not at liberty, at his own option, without the renewed concurrence of Vickers, to convert that offer into a binding agreement;

mutual consent is necessary, and an agreement was never obtained. I am therefore of opinion that, notwithstanding the negotiation, and the approximation to an agreement, which is shewn, a binding agreement was not in fact ever concluded. It appears to me therefore that this bill must be dismissed with costs.

A motion was made by the plaintiffs for the inspection of the parts of the books of the Railway Company which were sealed up, supported by an affidavit that they believed that such parts contained matter material to the plaintiffs' case, but this motion was refused by the Lord Chancellor with costs.

Plaintiffs applied for leave to give notice of motion to file a supplemental bill in the nature of a supplemental bill of review, and that the hearing of the appeal might be stayed until after the motion should be disposed of, which application was granted.

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July 16.

Motion for inspection of parts of books sealed up by order of Court, though supported by affidavit, refused with costs.

1843.

May 29.

Hearing of appeal stayed pending motion for leave to file supplemental bill, in nature of bill of review.

BEFORE SIR J. WIGRAM, VICE-CHANCELLOR.

THE EASTERN COUNTIES RAILWAY COMPANY v. TUFNELL
and Others.

BILL stated, that on the 21st May, 1838, plaintiffs entered into an agreement, in writing, with P. Ducane, Esq., for the purchase of a piece of land in the parish of Witham, in the county of Essex, which was required for the purposes of the railway, at the price of £400; £40 was paid

1843.

July 8.

A landowner, having contracted in writing for the sale of a piece of land to a Railway Company, died, having devised all his real estate in strict

settlement:—*Held*, that the costs of the suit, instituted for the purpose of procuring a conveyance to the Company under 1 Will. 4, c. 60, were to be defrayed out of the purchase-money.

Although it be necessary, if any of the parties interested be infants, that the conveyance should be settled by the Master, yet the Court will sometimes peruse the conveyance in order to save the expense of a reference.

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to the said P. D. on the day of the date of the agreement, and £360, the remainder of the purchase-money, was agreed to be paid to him by the Company, within twelve months from that date.

That on the 23rd May, 1841, P. D. died, having, by his will dated 25th August, 1830, devised all his real estate to trustees for a term of 500 years upon certain trusts in his will mentioned, and then to several persons in strict settlement.

That the will was proved by H. Tufnell alone, the other executor having renounced, and O. Hanbury was duly appointed trustee of the said will in the place of the executor so renouncing.

That in consequence of the limitations in the will there was no person to make a conveyance to the Company.

That the plaintiffs had paid the further sum of £360 and interest to the said H. T. and O. H.

The bill prayed that the defendants might be ordered specifically to perform the agreement, and that a proper conveyance of the land comprised in the agreement might be directed to be made to the plaintiffs, according to the provisions of the 1 Will. 4, c. 60.

The cause was heard as a short cause. The decree was made in accordance with the prayer of the bill; but a question arose as to who were to pay the costs of the suit.

Mr. Bigg, for the plaintiffs, cited *The Midland Counties Railway v. Wescomb* (a).

Mr. Shadwell, for the defendants, contended that the Company ought to have taken steps to complete the purchase and obtain a conveyance before the death of the testator, which did not happen until three years after the date of the agreement, and that they ought now to be de-

(a) Ante, Vol. 2, p. 211.

creed to pay the costs, as the necessity for a suit had been occasioned by their laches.

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VICE-CHANCELLOR WIGRAM.—It appears to me that no steps have been taken by either party to complete the contract; and, therefore, no question of laches arises. It seems impossible to answer what the Vice-Chancellor of England says in *The Midland Counties Railway v. Wescomb*; and therefore, following the judgment in that case, the defendants must pay the costs of the suit out of the purchase-money in the hands of H. T. and O. H., the Company paying the costs of the conveyance and of making out the title. There being infants concerned in this suit, the conveyance must be settled by the Master; but, if it is wished, I will look at the conveyance myself, for the purpose of saving expense to the parties.

BEFORE THE VICE-CHANCELLOR OF ENGLAND.

Ex parte COOKE, re LIVERPOOL AND MANCHESTER RAILWAY COMPANY.

June 30.

THE petition was presented in this case by a tenant for life of lands taken by the Railway Company under the powers of their acts (a); and it prayed the interim investment in the funds of the purchase-moneys which had been paid into Court by the Company.

A question arose whether the Company were liable under the provisions of their acts to pay the costs of such investment.

Mr. E. Cooke, for the petitioner.—The express words

Upon the construction of the 61st and 66th sections of the 7 Geo. 4, c. xlix:—*Held*, that the tenant for life of lands taken by the Railway Company was to pay the expenses of the interim investment of the purchase-moneys which had been paid into Court.

(a) 7 Geo. 4, c. xlix; 2 Vict. c. xli.

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of the 66th section of the 7th Geo. 4, c. xlix (a),—"The expenses of all purchases from time to time to be made in pursuance of this act,"—entitle the petitioner, as against the Company, to the costs of the investment in the purchase of three per cent Consols directed to be made by the 61st section. *Wildman v. Wildman* (b). The whole

(a) Sect. 61, "That if any money shall be paid, or agreed or awarded to be paid, for the purchase of any lands, tenements, or hereditaments to be purchased, taken, or used by virtue of the powers of this act, which shall belong to any body politic, &c., tenant for life or in tail, or to any feoffee in trust, &c., or to any person whose lands, tenements, and hereditaments are limited in strict or other settlement, or to any person under any other disability or incapacity, such money shall, in case the same shall amount to or exceed the sum of £200, be paid into the Bank of England, and, when so paid in, there remain until the same shall, by order of the said Court, upon a petition by the person or persons who will be entitled to the rents and profits of the said lands, &c. be applied either in the purchase or redemption of the land-tax, or in or towards the discharge of any debt or incumbrance affecting the same lands, &c.; or until the same shall, upon the like application, be laid out in a summary way, by order of the said Court, in the purchase of other lands to be settled to the like uses. And in the mean time, and until such order can be made, the said money may by order of the said Court, upon application thereto, be invested by

the said Accountant General in his name, in the purchase of three per cent. Consols; and in the meantime, and until the said Bank Annuities shall be ordered by the said Court to be sold for the purposes aforesaid, the dividends thereof shall, from time to time, be paid, by the order of the Court, to the person or persons who will, for the time being, be entitled to the rents and profits of such lands, tenements, and hereditaments, to be purchased, conveyed, or settled."

Sect. 66, "When, by reason of any disability, or incapacity of the person or persons, or corporations entitled to any lands, tenements, or hereditaments to be purchased, taken, or used under the authority of this act, the purchase-money for the same shall be required to be paid into the Bank of England, or be applied in the purchase of other lands, tenements, or hereditaments to be settled to the like uses; in pursuance of this act, it shall be lawful for the Court to order the expenses of all purchases, from time to time to be made in pursuance of this act, or so much of such expenses as the Court shall deem reasonable, together with the necessary costs and charges of obtaining such order, to be paid by the said corporation."

(b) 9 Ves. 177.

policy of the act is perfectly to indemnify the party whose lands shall be taken by the Company. *Ex parte Bishop of Durham*; *Ex parte Bishop of Ely* (in note thereto) (a); *Ex parte Northwick* (b); *Ex parte Trafford* (c); *Scales v. Pickering* (d).

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Mr. *Follett*, for the Railway Company, contended that the words of the act were not intended to comprise the costs of the interim investment.

VICE-CHANCELLOR OF ENGLAND.—I do not think that the costs of the interim investment are within the words of the 66th section. At any rate, I am of opinion, that the fact of subsequent Railway Acts having, in express words, given the costs of the interim investment, is, of itself, a statutory declaration that the former acts did not, according to their construction, carry such costs; and, that the legislature has excluded a contrary construction by the introduction of new language into subsequent acts. The petitioner must pay the costs of the investment.

(a) 3 Y. & C. 690.

(b) 1 Y. & C. 166.

(c) 2 Y. & C. 522.

(d) 4 Bing. 448.

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May 7.

THE QUEEN v. THE LONDON AND GREENWICH RAILWAY COMPANY.

By a railway act, (3 & 4 Will. 4, c. xlvi), it is enacted in sect. 46, that if this Company wish to purchase any part of certain property, they shall not be authorized to compel the sale of or to take less than the whole of such property.

Sect. 47 provides that the owner of any "house, manufactory, ground, or building," situate within fifty feet of the railway, may require the Company to purchase his rights and interests in such houses, manufactories, ground, or buildings.

A piece of ground, held under one lease, contained a principal dwelling-house, yard, and garden, occupied by a manufacturer, and a manufactory, and five smaller dwelling-houses in the occupation of under-tenants. The principal dwelling-house and garden only were within the fifty feet of the railway, and the Company did not wish to purchase any part of the property.

Held, that the owner could not compel the Company to buy more than the dwelling-house, yard, and garden.

IN Hilary Term last, *Thesiger* obtained a rule *nisi* calling upon the London and Greenwich Railway Company to shew cause why a *mandamus* should not issue to them, commanding them to issue a warrant to the sheriff of Surrey, in the manner directed by the act (3 & 4 Will. 4, c. xlvi, s. 47) passed for making the said railway, commanding the sheriff to impanel, summon, and return a jury to assess the sum of money to be paid by the Company to Messrs. N. Slee, W. Payne, & E. R. Slee, for the purchase of their interest in certain ground, buildings, and premises, belonging to them, situate in Church-street, in the parish of St. Mary Magdalen, Bermondsey, in the said county, and the sum of money to be paid by way of compensation for the loss, damage, and injury, which have accrued to such property, in respect of improvements, tenants' fixtures, machinery, and otherwise, and for the future damages, as well temporary as perpetual, and for all recurring damages done to and sustained by the said property by reason of the said railway, and the works thereof having been erected *within fifty feet* of the said property (a).

(a) The act 3 & 4 Will. 4, c. xlvi, s. 45, enacts, that if any corporation or other party, by this act authorized to sell and convey any lands, tenements, or hereditaments shall be applied to by or on behalf of the said Company, to treat for,

sell, dispose of, or convey any part of any house, warehouse, building, or manufactory, in the actual occupation of one person, or of several persons jointly, and shall, by notice in writing, to be left with the clerk of the said Company, within twen-

Messrs. Vickers & Slee, mentioned in sect. 46 of the 3 & 4 Will. 4, c. xlvi, as owners or lessees of property

ty-one days after such application, signify his inclination or desire to treat for, sell, dispose of, and convey the whole of such house, warehouse, building, or manufactory; and if it shall happen that the said Company shall not think proper or be willing to purchase the whole of such house, warehouse, building, or manufactory, then and in every such case nothing in this act contained shall extend or be construed to extend to compel such corporation or party interested therein to treat for, sell, dispose of or convey, or to authorize the said Company to take or use part only, or less than the whole of such house, warehouse, building, or manufactory, any thing herein contained to the contrary thereof in anywise notwithstanding.

By sect. 46, reciting, that certain persons therein mentioned, and amongst others "Messrs. Vickers and Slee," are "owners or lessees of different properties, consisting of divers messuages, buildings, manufactories, tanneries, garden-ground, &c., and other hereditaments, through which the said railway is intended to pass, or which may be required for the purposes of this act; and it may be extremely injurious to such owners or lessees, or their heirs, successors, executors, or administrators, if the said Company were not compelled to purchase the whole of any such properties respectively belonging to such owners or lessees, through which the said railway is intended to pass, or which may be required for the purposes of this act, if re-

quired by the respective owners or lessees thereof so to do;" it is enacted, "that if Messrs. Vickers & Slee," or the other persons therein mentioned, "shall be respectively applied to, by or on behalf of the said Company, to treat for, sell, dispose of, or convey, for the purposes of this act, any part of any property now respectively belonging to them, &c., as such owners or lessees, and the said several owners and lessees hereinbefore named, or their respective heirs, &c., shall, by notice in writing to be delivered to the treasurer, clerk, or any one of the directors of the said Company, signify his or their inclination to treat for, sell, dispose of, and convey the whole of such property belonging to any of the owners or lessees aforesaid, and it shall happen that the said Company shall not think proper or be willing to purchase the whole of such property, then and in every such case nothing in this act contained shall be construed to extend to compel Messrs. Vickers & Slee," and the said persons therein mentioned, "to treat for, sell, dispose of, or convey, or to authorize the said Company to take or use part only, or less than the whole of such property so respectively belonging to them the several owners or lessees, any thing hereinbefore contained to the contrary notwithstanding."

Sect. 47. "And whereas the said railway is intended to pass through, over, or along divers streets, lanes, and other public thoroughfares, in the parishes of

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through which the railway was intended to pass, were at the time of the passing of that act, in possession of the hereditaments and premises in Bermondsey, mentioned in the above rule, as lessees thereof, and upon part thereof carried on the business of vinegar makers in copartnership. Messrs. Slee, Payne, & Slee mentioned in the rule, were joint assignees of Messrs. Vickers & Slee (mentioned in s. 46) for an unexpired term of 61 years, and carried on the same business of vinegar makers, upon a portion of the same premises. The premises were a piece of ground con-

St. Mary Magdalen, Bermondsey, and St. Paul, Deptford, and also close to or adjoining divers dwelling-houses, manufactories, grounds, and buildings in the same parishes, and it may happen by reason thereof that the said houses, manufactories, grounds and buildings may become greatly deteriorated in value; be it therefore further enacted, that in case the owner, lessee, or occupier, or other person interested in any house, manufactory, ground, or building within the said parishes of St. Mary Magdalen, Bermondsey, and St. Paul, Deptford, or either of them, *which shall be situate within fifty feet of such railway*, shall by notice in writing, to be left at the office of the said Company, require the said Company to purchase his rights and interests in such houses, manufactories, ground or buildings, it shall be lawful for the said Company, and they are hereby required, within thirty days after the service of such notice, to treat for the purchase of his interest in the houses, manufactories, ground, and buildings mentioned in such notice, and for the compensation, recompense, or satisfac-

tion to be made to him, for any loss, damage or injury in respect of any improvements, tenant's fixtures, machinery or otherwise; and in case the party so giving such notice and the said Company shall not agree as to the amount or value of the satisfaction, recompense or compensation, to be paid for the value of such houses, manufactories, ground and buildings, improvements, tenant's fixtures, machinery or otherwise, then the amount or value of such satisfaction, recompense or compensation, shall be ascertained and settled by the verdict of a jury, in the manner hereinbefore directed for ascertaining and settling the value or recompense for other lands, tenements, hereditaments and premises, to be taken or purchased for the purposes of this act."

By the 3 & 4 Vict. c. cxxvii, the Company are empowered to widen their railway by forming two additional lines of railway thereon, on the portion thereof which is between the junction of the London and Croydon Railway and the terminus near London bridge.

taining one principal dwelling-house, and yard and garden attached, in the occupation of one of the partners, and five smaller dwelling-houses in the occupation of various tenants, a brewery, vinegar manufactory, warehouses, sheds, stables, coachhouse, cooperages, stoves, vaults, and buildings. The piece of ground contains, on the east side, about 226 feet, on the south, 162 feet, on the west, 260 feet, and on the north (the side next to the railway) about 180 feet. Under the powers of the 3 & 4 Vict. c. cxxvii, the Company had widened their railway, so as to bring the southern boundary of it within twenty-five feet of the nearest part of the piece of ground, so that a line drawn fifty feet from that boundary, included a portion of the principal dwelling-house and the garden. The remainder thereof and the rest of the premises were more than fifty feet from the railway.

The Company were willing to purchase the principal dwelling-house, yard, and garden, but were required by the partnership to take the whole of the premises.

Sir *W. Follett*, Solicitor-General, and *W. J. Alexander*, now shewed cause. This application is founded on sect. 46, which does not affect the case, as the Company do not require any part of this property. They are willing to purchase so much of it as is within fifty feet of their railway, which is all that, under sect. 47, they can be compelled to do. If it were not so, they might be required, in the case of a large proprietor, to take detached premises at a distance, merely because they were held under the same lease.

Thesiger, Erle, and *Wordsworth*, contra. The Company ought to be obliged to take all the premises employed for a common purpose, or it might happen that the building actually employed for the manufactory might be rendered useless, by being deprived of all access to it. At all events, if they are not obliged to purchase, the compensation must

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be assessed for the injury done to the rest of the property, which, by sect. 51, is to be ascertained separately. *Bell v. The Hull and Selby Railway Company* (a), and *Reg. v. The Eastern Counties Railway Company* (b), shew that the word "injury," in clauses of this kind, ought to have a liberal interpretation, and that any injury to property which can be shewn to arise from the prosecution of such works, should be fairly compensated for to the party sustaining it; and *Lister v. Lobley* (c) shews that the word "owners," used in sect. 47, extends to the interests, not merely of owners of the inheritance, but of any person having a beneficial interest in the land, and that a termor is entitled to compensation.

Lord DENMAN, C. J.—This is an application to the London and Greenwich Railway Company, to issue their warrant to the sheriff of Surrey, to summon a jury for the purpose of assessing the purchase-money and compensation for certain premises, not immediately adjoining their railway, but partly within fifty feet of that additional part of it, which has been constructed under the provisions of a recent act. The premises consist both of a dwelling-house and garden, and a manufactory, and part of the former is within fifty feet of the railway, and part without; and the Company are called upon to take not merely the whole house and garden, but the whole piece of ground, including the vinegar manufactory, which is situate on the other side of a yard. It would seem that this application was made under the notion that this case fell within the 46th section, which provides, that if the Company desire to take part of a property, they must take the whole; but that section does not apply here, as the Company do not want

(a) Antè, vol. 2, p. 279; 6 M. & D. 444.
 & W. 699.

(c) 6 N. & M. 340.

(b) Antè, vol. 2, p. 736; 2 G.

to purchase any part of these premises. It is true that, under that section, if they wish for any part of the property of the complainants, amongst other parties therein mentioned, they are compellable to take the whole of such property, apparently using the word in a collective sense. But sect. 47, which enables the owner of premises within fifty feet of the railway to call upon the Company to take such premises, omits the word "property" altogether, and says that, if the owner of any house, manufactory, ground, or building, which shall be situate within fifty feet of the railway, shall himself desire it, he may call upon the Company by notice, to treat for the purchase of his interest in the houses, manufactories, ground, and buildings mentioned in such notice. These words are much less general; nothing is said about the Company purchasing the whole, if part is within the fifty feet. They are willing to purchase the dwelling-house, yard, and garden, which are within the fifty feet; and that is all that sect. 47 requires them to do. This rule, therefore, must be discharged.

PATTERSON, J.—Section 46 refers only to particular circumstances, when, if the Company should find it necessary to purchase any part of the property of certain individuals, they must take the whole. The Company want no part of this property, therefore the 46th section is out of the case. Section 47 relates to all persons whatsoever, and seems, in its language, to have some connection with sect. 45, which provides, that if any party shall be applied to by the Company to sell any part of any house, warehouse, building, or manufactory, he shall not be compelled to sell part only, or less than the whole of such house, warehouse, building, or manufactory. Even under that section, the Company, if they had wished for any part of the house and garden, by offering to take the whole, would have offered as much as could

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be required of them, giving the fullest meaning to the words of the act. *A fortiori*, under sect. 47, they cannot be compelled to take the whole of this property, when they want none of it whatever.

WILLIAMS, J.—By sect. 47, the Company are required to purchase premises within fifty feet of the railway, which they are willing to do to a certain extent here. If they offered to take part only of the house or garden, it would be a different question. It is said, because all this property is comprised under one take or lease, that therefore the word manufactory includes the whole of it as one *entire* thing. But it is not shewn that the Company, by taking the house and garden, will at all interfere with the residue of the premises.

WIGHTMAN, J.—The consequence of making this rule absolute, would be to give the same effect to the 46th and 47th sections, which are essentially different both in words and circumstances.

Rule discharged.

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COURT OF EXCHEQUER.

*In Trinity Term, 1842.*DOE *d.* FISHER *v.* ROE.

May 25.

H. HILL moved for judgment against the casual ejector. The land sought to be recovered formed part of the bed of the Grand Junction Canal, of which the Company were the tenants. The affidavit of service stated that the declaration had been delivered to the clerk of the Company at their office; which is sufficient, *Anonymous* (a). In *Tupper v. Doe* (b), service of a declaration on the parish officers, who rented a house, but occupied it only by placing the poor in it, was held sufficient. This is a corporate body, and therefore the directors cannot be recognized as distinct from it.

In ejectment to recover land forming part of the bed of a canal in the occupation of an incorporated Company, service of declaration on the clerk of the Company at their office is sufficient for a rule *nisi*.

Rule *nisi* granted.

(a) 2 Chitt. 181.

(b) 1 Barnes, 181.

THE ATTORNEY-GENERAL *v.* THE EASTERN COUNTIES
RAILWAY COMPANY.

May 26.

IN Easter Term, *Cresswell* had obtained a rule calling upon the Attorney-General to shew cause, why, upon payment of one sum of £125 in satisfaction of one of four in-

Four deodands having been estreated into the Court of Exchequer, under the 3 & 4

Will. 4, c. 99, s. 29, upon four coroner's inquisitions, which found, that the deaths of four persons were respectively caused on a certain day, by a certain steam-engine, and each imposed a deodand of £125 on the engine, the Court refused to stay proceedings on three inquisitions on payment of one deodand of £125, but left the defendants to their remedy by traversing, or quashing the inquisition.

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quisitions, the deodands of which had been estreated into this Court, under 3 & 4 Will. 4, c. 99, s. 29, all further proceedings to levy the rest should not be stayed.

In the first inquisition, the jury summoned to inquire into the cause of the death of one W. Austin, found, by their verdict, that, on the 18th of August, 1840, a certain railway steam-engine, with a train of carriages containing passengers, &c., ran off the line of railway, whereby the engineer of the said engine was hurt, and the boiler exploded, in consequence whereof the said W. Austin was scalded and burnt, and received injuries of which he afterwards died; and that so the said W. Austin, in the manner aforesaid, accidentally, casually, and by misfortune, came by his death; and that the said steam-engine was then moving to the death of the said W. Austin, and was then of the value of £125, and was then the property and in the possession of the Eastern Counties Railway Company.

The other inquisitions were on three other persons, in the same form, and each imposing a like deodand of £125; and the affidavits in support of the rule stated, that the several persons in the several inquisitions named had met their deaths by one and the same accident, and that the steam-engine in all the inquests mentioned was the same; and that, having been once forfeited in respect of the accident, and a deodand imposed, it could not be forfeited again for the same accident.

Sir F. Pollock, Attorney-General, (*Jervis* with him), shewed cause, and contended that there was nothing on the face of the inquisitions to shew that the deaths arose from the same accident; and even if there were, it might be supposed that the jury, estimating the value of the engine at £500, had divided that sum into four sums of £125 each: at all events, the inquisitions ought to have been traversed.

Cowling, contra.—If the proceedings on these inquisi-

tions had been taken in the old mode, by process, the defendants might have traversed; but now they have no mode of applying for relief but to the equitable jurisdiction of this Court. Upon the principle in *Crepps v. Durden* (a), that no person can commit more than one offence against the 29 Car. 2, c. 27, by exercising his ordinary calling on a Sunday; so, where an engine at one time or on one day causes the death of several persons, one deodand only is payable for all.

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LORD ABINGER, C. B.—This rule must be discharged. We have no right to travel out of the inquisitions; and, according to the terms of them, the Crown is entitled either to four engines or four sums of £125. If you go beyond that, it would be an endeavour to explain a record by extrinsic evidence.

ALDERSON, B.—These inquisitions are consistent with the supposition that the deaths occurred by different engines on different days, as the day is no essential part of the finding. It is said that this is an application to the equitable jurisdiction of this Court; but if we travelled out of the record, we should do so on one side as well as the other. The Company have the power to redeem the whole sum of £500 by giving up the engine; and if they ask for equity, they should begin by doing equity themselves.

GURNEY, B.—The defendants should either traverse, or move the Court of Queen's Bench to quash the inquisition.

Rule discharged.

(a) Cowp. 640.

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COURT OF QUEEN'S BENCH.

In Trinity Term, 1842.

THE QUEEN v. THE BIRMINGHAM AND GLOUCESTER RAILWAY COMPANY.

May 28.

The Court of Q. B. refused to quash an indictment against a Company by their name of incorporation, upon motion, but left the defendants to demur, with liberty to plead over, if the demurrer should be overruled.

And *Ald.* upon demurrer, that an indictment will lie against a corporation aggregate by their name of incorporation for a nonfeasance.

And where a corporation cannot appear by attorney, as in the case of an indictment found at the assizes or sessions, the proper mode of proceeding against them, to enforce the remedy by indictment, is by distress infinite to compel appearance, after removal by certiorari.

IN Hilary Term, 1841, *Whateley* had obtained a rule calling upon the prosecutor to shew cause why an indictment, found against this Company by their corporate name, for disobedience to an order of justices, and an order of sessions which confirmed it, should not be quashed, on the ground that a corporation aggregate is not liable to an indictment by their corporate name.

The act, 6 & 7 Will. 4, c. xiv, incorporating the Company, provides (section 49), "that when the Company shall take any land for the purposes of the act, they shall forthwith make and erect, and from time to time maintain, such and so many bridges, arches, passages, &c. over, under, or by the side of, or leading to or from, the said railway, of such dimensions and in such manner as two or more justices shall, upon application of the owner or occupier of any lands, judge necessary and appoint."

An order had been made by two justices on the Company to make an arch under the railway for the convenience of the lands in question; which order was confirmed, upon appeal, by the quarter sessions. This indictment was found against the Company by their corporate name of "The Birmingham and Gloucester Railway Company," at the Worcestershire Spring Assizes, 1839, for disobeying such order, and was removed into this Court by certiorari. The Company had not appeared or pleaded (a).

(a) *Regina v. The Birmingham and Gloucester Railway Company*, 9 C. & P. 469.

Talfourd, Serjt., shewed cause (a).—There is a distinction between cases of misfeasance and nonfeasance. In the former, a corporation aggregate is not so indictable; because, where an act is done, the individuals taking part in it only are responsible; see the case of *Thursfield and Jones, Master and Wardens of the Company of Wax Chandlers* (b): and the note of Lord Holt, C. J., to *Anonymous* (c). But in a case of non-feasance, which is an omission to perform a duty cast upon the corporation, such an indictment will lie against them. *Rex v. The Mayor, Aldermen, and Burgesses of Stratford-upon-Avon* (d), *Rex v. The Regent's Canal Company* (e), *Rex v. The Company of Proprietors of the Kennet and Avon Canal Navigation* (f), *Rex v. The Dean and Chapter of Christchurch* (g). The same objection would apply with equal force to a mandamus, disobedience to which would be punishable by attachment, or to an indictment against the inhabitants of a parish, where a fine may be enforced. At all events, this Court will not quash the indictment on a doubtful point, but will leave the parties to their remedy by demurrer or otherwise; *Rex v. Cooke* (h).

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Whateley, contra.—In *Rex v. The Company of Proprietors of the Kennet and Avon Canal Navigation* (f), certain individuals were named as defendants, against whom process might issue in case of disobedience. That should have been done in the present instance. The clause enabling such Companies to appear by an officer applies only to actions. [Lord Denman, C. J.—We do not wish to express any opinion upon this matter on motion. You may demur.]

(a) May 27th, 1841, before Lord Denman, C. J., *Patteson, Williams, and Wightman, Js.*

(b) Skinn. 27.

(c) 12 Mod. 559.

(d) 14 East, 348.

(e) Cited in *Regina v. The Lon-*

don and Birmingham Railway Co., ante, Vol. 1, p. 323.

(f) 3 Chit. Crim. Law, 600.

(g) Id. 603.

(h) 2 B. & C. 618, 871; 4 D. & R. 114.

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If the demurrer be overruled, the judgment of the Court will be final in the case of an indictment for a misdemeanor.

Lord DENMAN, C. J.—The defendants may demur, and if the demurrer is overruled, they shall be at liberty to plead over.

Rule discharged.

The defendants accordingly appeared and demurred—

Whateley, in support of the demurrer (a).—An indictment cannot be supported against the Company in their corporate name, and, as they can only appear by attorney and not in person, at the assizes or sessions, where parties must appear in person, they have no means of pleading to it. In this case, the Company applied to be allowed to plead, but the officer of the Court refused to take the plea, on the ground of there being no precedent for such proceeding; *Regina v. The Birmingham and Gloucester Railway Company* (b). It is no answer to say that here a plea can be put in: if an indictment is sustainable, the defendants have a right to plead in the county where the indictment originated. Then supposing them to be found guilty, how are they to be punished. The form of a judgment in misdemeanors is, that the defendant be *taken* to answer for the fine, as in *Rex v. Fanshaw* (c), where the judgment runs, “Super quo, &c. consideratum est per Curiam hîc, quòd prædictus T. F. solvat dicto Domino Regi pro fine suo, &c., £20. Et quòd idem T. F. *capiatur* ad satisfaciendum dicto Domino Regi, de fine prædicto, &c.” And in *The Case of Sutton’s Hospital* (d), Lord Coke says, “A cor-

(a) January 26th, 1842, before *Patteson, Coleridge, and Wightman, Js.*

(b) 9 C. & P. 469.

(c) Trem. P. C. 204. And see

Att.-Gen. v. Holles, Id. 302.

(d) 10 Rep. 1 a, 32 b. And see Plow. Com. 213, and *The Lord Berkley’s case*, Id. 245.

poration aggregate of many is invisible, immortal, and rests only in intendment and consideration of the law ; and, therefore, in 89 H. 6. 18 b. 14, a Dean and Chapter cannot have predecessor nor successor ; 21 E. 4, 27 (72) a., and 30 E. 3. 15. They cannot commit treason, nor be outlawed, nor excommunicated, for they have no souls ; neither can they appear in person, but by attorney ; 33 H. 8. Br. Fealty." And in Com. Dig., "Franchises" (F. 19), it is said, "Process of outlawry does not lie against a corporation aggregate ; and therefore trespass does not lie against a corporation, but against the particular persons only ; for a capias and exigent do not go against a corporation." And in a note on *Anonymous* (a), *Holt*, C. J., says, "A corporation is not indictable, but particular members of it are."

Several authorities may probably be cited on the other side of indictments against corporations, but they do not contravene the principle contended for, as they are all against individuals also, who were easily to be discovered ; as in *Rex v. The Company of Proprietors of the Kennet and Avon Canal Navigation* (b) for not repairing a bridge which the corporation were bound to maintain ; where the form of the indictment was against the assignees of the corporation and certain individuals by name, who would be liable for the fine if the indictment were bad against the Company. In *Rex v. Mayor, Aldermen, &c. of Liverpool* (c), and *Rex v. Mayor, &c. of Stratford-upon-Avon* (d), which were indictments against corporations, the objection was not taken.

But those cases are distinguishable, for it was easy to ascertain who those persons were. A manuscript note exists in the Crown Office of a motion to quash an indictment of H. T. 1778, against *The owners and occupiers of a piece of ground called Burne in Easingwold*, be-

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(a) 12 Mod. 559.

(c) 3 East, 86.

(b) 3 Chitt. Crim. Law, 600.

(d) 14 East, 348.

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cause no person was named: the rule was unopposed and made absolute: and there is a note on the case by Mr. Dealtry—"Therefore an indictment against those obliged to repair a road *ratione tenuræ* ought to mention the names of the persons bound to repair, and not to run generally against the owners, &c., as if it was against the inhabitants of a district."

The clause in all these acts, that the Company may sue or be sued by their secretary, though only used in civil proceedings, justifies this view, for without such provision an action must be brought against all. [*Patteson*, J.—If they are a corporation, why should they not sue and be sued in their corporate name? *Coleridge*, J.—You carry your argument so far as to say trespass will not lie.] The authorities say so. [*Patteson*, J.—That assertion is much shaken by *Yarborough v. The Bank of England* (a). If trover will lie, why should not trespass?] Lord *Ellenborough*, C. J. there distinguishes between them. It is averred here that the Company have notice,—how can that be? In case of contempt, in misfeasance, each individual would be taken to have notice if it were given to one; but that would not be so in nonfeasance; which is an answer to the distinction taken between them by the other side.

Talfourd, Serjt., *contra*.—Although there is no authority for the particular case in question, yet the course of the precedents for centuries has been uniform, that a corporation aggregate is indictable for a nonfeasance in its corporate name. The argument on the other side rests on no authority but the note of *Holt*, C. J., in *Anonymous* (b). It was once

(a) 16 East, 6; and see *Maund v. The Monmouthshire Canal Co.*, *post*, p. 159.

(b) 12 Mod. 559. But *Kyd* on Corporations, p. 226, says, with regard to that note—"I apprehend that this can only apply to the case

of a crime or misdemeanor, and that an indictment may lie in the cases cited (of non-repair of a bridge or highway) as well as against a county or a parish." And see *Hawk. P. C.*, B. 1, c. 77, s. 3, citing 22 Hen. 8, c. 5.

doubted whether a corporation could commit a tort, but that has been decided in *Yarborough v. The Bank of England* (a). It is said that great inconvenience would arise in consequence of the parties not being able to appear and plead, but there is no difficulty in their doing so by their attorney; at all events in this Court. The process which issues is the same as in every case where outlawry does not lie, as against a peer for any offence except treason, murder, or breach of the peace. Hawkins says (b)—“The proper process for offences below the degree of treason, felony or maihem, to compel appearance, is *venire facias* and distress infinite.” The difficulty of compelling the appearance of a corporation is not confined to indictments, for it was felt in the Court of Chancery in the case of *Salmon v. The Ham-borough Company* (c). There a bill was filed, and the Lord Chancellor (*North*) dismissed the bill, “because appearance could not be compelled,” but the House of Lords, on appeal, reversed that decision, in an elaborately framed judgment, after which a *distringas* was issued.

An action for false return may be brought against a person in contempt of a peremptory mandamus, though attachment may not lie, according to *Men of Guildford v. Mills* (d), *Morgan v. The Corporation of Carmarthen* (e). But supposing there were these difficulties in the process, that does not prove the indictment will not lie; for, in *Res v. The Inhabitants of Clifton* (f), where it was held, that the inhabitants of part of a parish lying in one county cannot be charged with repairs, but the whole parish must be included, and it was urged that the Court could not by process enforce the appearance of that part of the inhabitants without the county, Lord *Kenyon*, C. J., says, “Every difficulty respecting the process may be obviated

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(a) 16 East, 6.

‘Corporations,’ (B. a) 2.

(b) Hawk. P.C., B. 2, c. 27, s. 12.

(d) 2 Kebl. 1.

And see 3 Bl. Com. 289.

(e) 3 Kebl. 350.

(c) Ca. Chan. 204; 6 Vin. Abr.

(f) 5 T. R. 498.

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by removing the indictment into this Court;" and then points out, that, by compelling the appearance of two who live within the county, all may be ultimately liable. And see the judgments of *Ashurst, J.*, and *Baller, J.*, to the same effect.

In *Rex v. The Severn and Wye Railway Company (a)*, it was not doubted that indictment would lie, though it was conceded that a mandamus would be a more effectual remedy. *Abbott, C. J.*, says,—“I have entertained considerable doubt during the discussion whether the Court ought to grant a mandamus to compel the doing of an act, the omission to do which may be prosecuted by indictment.” And in *Rex v. The Commissioners of Dean Inclosure (b)*, Lord *Ellenborough, C. J.*, says, “Upon the objection of there being another remedy in this case, I cannot help thinking, that what has been observed by the counsel in support of the rule is extremely material, and that an indictment would not afford that convenient mode of remedy which might be attained by mandamus.” Both these cases are authorities, however, to shew that a body corporate may be indicted, although a mandamus may also be granted.

There are several precedents in point besides those mentioned by the other side. *Rex v. The Mayor, Aldermen, Bailiffs, and Burgesses of Carlisle (c)*, for not repairing a highway which they were bound to do by reason of their being entitled to toll thorough: *Rex v. The Corporation of Gloucester (d)*, for non-repair of the gaol: *Rex v. The Dean and Chapter of Christchurch and the Corporation of Oxford (e)*, for not repairing a watercourse: and *Rex v. The Corporation of Newcastle-upon-Tyne (f)*, for not clearing a port: and in *Rex v. Mayor, &c. of Stratford-upon-Avon (g)*, one of those mentioned, the liability of corporations was dis-

(a) 2 B. & A. 646.

(b) 2 M. & S. 80.

(c) 4 Wentw. 157.

(d) Cr. Cir. Asst. 398.

(e) Cr. Cir. Comp. 377.

(f) 3 Ch. Crim. Law, 604. *

(g) 14 East, 348.

cussed at great length, but it was not suggested that they were not indictable. In the case of *Thusfeld and Jones, Master and Wardens of the Company of Wax-Chandlers* (a), they were cited in the spiritual Court by their names and additions; upon this they moved for a prohibition, and shewed for cause that they were cited by their surnames and names of baptism, and so sued in their natural capacity, when it should be in their politic capacity; but the Court said, "there was no other way of citing them than this; they could not cite the body politic; and, therefore, unless by this way, they had no remedy: and it was not like a *distringas* at common law, by which they may take lands or goods of the Company; but if the Company had neither land nor goods, there was no way to make them appear; but here they said they were cited by their proper names, but in their politic capacity, but if they stood out, they must lie by the heels in their natural capacity;" and so the prohibition was denied. There are also authorities to shew that individual members are not liable for the acts of the body. In *Harman v. Teppenden* (b), *Lawrence, J.*, says: "No action lies against individuals for acts erroneously done by them in their corporate capacity from which detriment happens; at least without charging and proving that the defendants, in their corporate capacity, had tortiously procured those acts to be done by the corporate body."

The Statute of Additions (1 Hen. 5, c. 5) (c) supplies a strong argument, for it applies only to cases where there is

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(a) Skinn. 27.

(b) 1 East, 555.

(c) "Item, it is ordained and established, that in every original writ of actions personal, appeals and indictments, and in which the exigent shall be awarded in the names of the defendants in such writs original, appeals and indictments,

additions shall be made of their estate or degree or mystery, and of the towns or hamlets or places and counties of the which they were or be, or in which they be or were conversant. And if, by process upon the said original writs, appeals, or indictments, in the which the said addition be omitted, any utla-

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process of outlawry. That statute was much considered in *Johnson's Case* (a), and in *The Lord Dacre's Case* (b), where it is said that exception was taken to the indictment, because it was not expressed of what place he was. *Sed non allocatur*. For the Court said, "That the process of outlawry lieth not against him, but distress (c)." And see Rolle's Abridgment, 780. But it does not follow that an indictment will not lie where there is not process of outlawry. The absence of a decision on a subject of duties of such familiar occurrence, where the cases must have been infinite in number, tend strongly to shew that this indictment is maintainable.

Whateley, in reply.—In all the modern precedents cited, individuals are always included; see *Rex v. Pease* (d). [*Patteson*, J.—Were there any individuals in *Rex v. Mayor &c. of Stratford-upon-Avon* (e)? that was a corporate name.] There was no difficulty in ascertaining who the mayor and burgesses were. [*Coleridge*, J.—If you say that was only an irregular mode of naming individuals, who might nevertheless be taken, why should not that be so here?] There is the authority of Lords *Coke* and *Holt*, and *Comyns*, C. B., for the position contended for: and the case cited of *The Hamborough Company* is so also, for the members are made personally liable. In *Regina v. Ledgard and Others, Mayor, Aldermen, and Councillors of Poole* (f), the Court ordered a mandamus to issue against individuals, and the case in *Skinner* shews that individuals may be in-

garies be pronounced, that they be void, frustrate, and holden for none; and that, before the utlagaries pronounced, the said writs and indictments shall be abated by the exception of the party, where in the same the said additions be omitted."

(a) Cro. Jac. 610.

(b) Cro. Eliz. 148.

(c) Citing *The Lord Pagett's Case*, 8 Hen. 6 pl. 9. b. 1; Wilson, 244; 21 Hen. 6. pl. 24; 2 Hale, 178.

(d) 4 B. & Ad. 30, 1 N. & M. 690.

(e) 14 East, 348.

(f) 1 Q. B. R. 616; 10 Law J. (N. S.), Q. B., 198.

dicted. There is, therefore, no instance in which an indictment is shewn to be good without a *designatio personæ*; and *Littledale, J.*, when this rule was moved for, said it was the first time he had ever heard of one.

Cur. adv. vult.

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PATTESON, J., now delivered the judgment of the Court.—This case was argued in the absence of my Lord *Denman*. It was an indictment against a Railway Company, by their corporate name, for refusing and neglecting to make an arch and certain other works, pursuant to an order of justices made under the authority of the Railway Act. The indictment was found at the quarter sessions, and removed into this Court by certiorari, when the Company appeared and demurred generally, upon the ground that an indictment would not lie against a corporation.

Upon the argument it was not contended on the part of the Company that an action of trespass might not be maintained against a corporation; for, notwithstanding some dicta to the contrary in the older cases, it may be taken for settled law, since the case of *Yarborough v. The Bank of England (a)*, in which the cases were reviewed, that both trover and trespass are maintainable: but it was said that an indictment will not lie against a corporation. Only one direct authority was cited for this position, and it is a dictum of Lord *Holt* in an *Anonymous* case, reported in 12 Mod. 559. The report itself is as follows: “Note: per *Holt*, Chief Justice.—A corporation is not indictable, but the particular members of it are.” What the nature of the offence was to which the observation was intended to apply does not appear; and as a general proposition it is opposed to a number of cases, which shew that a corporation may be indicted for breach of a duty imposed upon it by law,

(a) 16 East, 6. And see *Maund v. The Monmouthshire Canal Co.*, post, p. 159.

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though not for a felony, or for crimes involving personal violence, as for riots or assaults: *Hawk. P. C.*, B. 1, c. 66, s. 13.

A corporation aggregate may be liable by prescription, and compelled to repair a highway or bridge: *Hawk. P. C.*, B. 1, c. 76, s. 8, and c. 77, s. 2. And in the case of *Rex v. The Mayor, &c., of Liverpool* (a), the corporation were indicted by their corporate name for non-repair of a highway; and, upon argument in this Court, the indictment was held to be defective; but no question was made as to the liability of a corporation to be indicted.

In the case of *Rex v. The Mayor, &c., of Stratford-upon-Avon* (b), the corporation was indicted by its corporate name for non-repair of a bridge, and found guilty; and, upon argument in this Court, the verdict was sustained, and no question made as to the liability generally of a corporation to an indictment for breach of a duty cast upon it by law.

Upon the discussion of the question in the present case, the counsel for the Company relied chiefly upon the circumstance of the indictment being found at the quarter sessions, where the Company could not appear, and take their trial, even if so disposed, as a corporation can only appear by attorney, and the appearance at the sessions must be in person. We think there is no weight in this objection: it may indeed impose some difficulty upon the prosecutor, and render his proceedings more circuitous, as he will be obliged to remove the indictment by certiorari into this Court, in order to make it effective; but the liability of the corporation is not affected.

In the case of *Rex v. Gardner* (c), it was objected that a corporation could not be rated to the poor, because the remedy by imprisonment upon failure of distress was impossible; but the Court considered the objection of no

(a) 3 East, 86.

(b) 14 East, 348.

(c) 1 Cowp. 79.

weight, though it might be that there would be some difficulty in enforcing the remedy.

The proper mode of proceeding against a corporation, to enforce the remedy by indictment, is by distress infinite to compel appearance, after removal by certiorari, as suggested by Mr. Baron *Parke* in this very case, as reported in 9 C. & P., 469, and as appears by Hawk. P. C. B 2, c. 27, s. 14, and the cases cited in 6 Viner's Abridgment, 310 &c. "Corporations," (B. a).

We are therefore of opinion that upon this demurrer there must be judgment for the Crown.

Judgment for the Crown (a).

(a) See the next case.

COURT OF COMMON PLEAS.

In Trinity Term, 1842.

**MAUND v. THE MONMOUTHSHIRE CANAL NAVIGATION
COMPANY.**

TRESPASS against the Company of Proprietors of the Monmouthshire Canal Navigation for taking barges and coal. Plea, not guilty (by statute) (a).

The cause was tried before *Cresswell*, J., at the Monmouthshire Spring Assizes, when it appeared that the barges and coal had been seized by the agent of the Monmouthshire Canal Company, for tolls claimed to be due to

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Trespass, as well as trover, will lie against a corporation aggregate.

(a) 32 Geo. 3, c. cii, the act incorporating the Company.

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them. It was objected that trespass would not lie against the Company. A verdict was taken for the plaintiff by consent, leave being reserved to the defendants to move to enter a verdict or to arrest the judgment, and *Talfourd*, Serjt., in Easter Term, having obtained a rule *nisi* accordingly on the authorities cited in the last case,

Ludlow, Serjt., now shewed cause (a), and cited *Yarborough v. The Bank of England* (b), and the recent decision in *Regina v. The Birmingham and Gloucester Railway Company* (c); upon which,

Talfourd, Serjt., admitted he could not support his rule.

TINDAL, C. J.—The process in trespass and trover is the same,—attachment, distress, capias, outlawry; therefore, when once it is established that trover will lie against a corporation, there can be no reason why trespass should not also be maintainable.

Rule discharged.

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| (a) Before <i>Tindal</i> , C. J., <i>Coltman, Maule, and Cresswell</i> , Js. | <i>The Birmingham Gas Company</i> , 1 A. & E. 526. |
| (b) 16 East 6. And see <i>Duncan v. The Proprietors of The Surrey Canal</i> , 2 Stark. 50; and <i>Smith v.</i> | (c) Antè, p. 148; 2 Q. B. R. 47; 1 G. & D. 457; 2 Id. 236. |

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COURT OF QUEEN'S BENCH.

In Trinity Term, 1842.

THE QUEEN v. THE GREAT WESTERN RAILWAY COMPANY. May 28.

IN Easter Term, *Talbot*, upon reading certain affidavits and an inquisition taken before J. J. Blandy, Esq., one of the coroners for the borough of Reading, on the 31st of December, 1841, on view of the body of Richard Woolley, then and there lying dead, obtained a rule *nisi*, calling upon the said coroner and the solicitors for the affairs of Her Majesty's Treasury, to shew cause why the said inquisition should not be quashed.

The inquisition was as follows:—

"Borough of Reading, to wit.—An inquisition indented taken for our Sovereign Lady the Queen, at the Royal Berkshire Hospital, in the parish of St. Giles, in the said borough of Reading, and from thence continued by adjournment to the public office in the parish of St. Lawrence, in the said borough, on the 31st day of December, in the fifth year of the reign," &c. (5 Vict.) "before John Jackson Blandy, Esq., one of the coroners of our said Lady the Queen for the said borough, on view of the body of Richard Woolley, now in the parish of St. Giles, in the borough aforesaid, lying dead, upon the oaths of William Ferguson, &c., the several persons whose names are hereunder written, and seals affixed, good and lawful men of the said borough, duly chosen, and who being there and

The coroner of a borough has no jurisdiction to take an inquisition in a case of *accidental* death, where the cause of death arose out of the borough, though the death took place within it.

And, therefore, the Court quashed an inquisition, for want of jurisdiction appearing upon the face of it, which purported to be taken in the borough of Reading, by the coroner and a jury of the borough, on view of the body of R. W., lying dead within the borough; and which found that R. W. (by being thrown out of a railway carriage) accidentally received a mortal fracture, *in the*

county of Berks, &c., and afterwards died of the said fracture in an hospital *within the borough of Reading.*

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then duly sworn and charged to inquire, for our said Lady the Queen, when, how, and by what means the said R. W. came to his death, do upon their oath say, that the said R. W., on the 24th day of December, in the year aforesaid, at the parish of Sonning, in the county of Berks, then and there being in a certain carriage, then and there attached to a certain engine then and there drawing the same, it so happened that the said R. W. was then and there casually, accidentally, and by misfortune, overturned and violently thrown out of the said carriage to and against the ground, by means whereof the said R. W. did then and there receive one mortal fracture in and upon the hinder part of the head of him the said R. W., of which said mortal fracture the said R. W., from the said 24th day of December, in the year aforesaid, until the 29th day of December in the same year, at the parish and county last aforesaid, and also at the parish of St. Giles, in the said borough of Reading, to wit, in a certain hospital there, called the Royal Berkshire Hospital, did languish, and languishing did live; on which said 29th day of December in the year aforesaid, in the hospital aforesaid, at the parish last aforesaid, in the borough aforesaid, the said R. W. of the mortal fracture aforesaid did die. And so the persons aforesaid, upon their oaths aforesaid, do say, that the said R. W., in manner and by the means aforesaid, accidentally, casually, and by misfortune, came to his death, and not otherwise; and that the said carriage and engine were moving to the death of the said R. W., and are of the value of £100, and are the goods and chattels, and in the possession, of the Great Western Railway Company. In witness whereof, as well the said coroner, as W. F., the foreman of the said jurors, and the rest of the said jurors have to this inquisition set their hands and seals, the day and year first above written."

Waddington (Sir F. Pollock, A. G., with him), for the

Crown (a).—The principal objection made to this inquisition is, that being taken before the coroner of the borough of Reading, and stating that the cause of death arose in the county of Berks, it shews, upon the face of it, that the coroner of Reading has no jurisdiction in the case (b).

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According to all the early statutes establishing and defining the duties of coroners, this objection cannot prevail; and it was so admitted in the case of *Regina v. The Grand Junction Railway Company* (c). The general law as to this officer is still founded on 4 Edw. 1, c. 2, (*De Officio Coronatoris*), where, after stating that the first inquiry is to be "where a person was slain," it is said (s. 1), "If it fortune any man be slain in the fields or woods, and be there found, first, it is to be inquired whether he were slain there or not." If the jurisdiction of the coroner was intended to cease in the latter case, the statute would have gone on to say, that, if it so turned out, the body should be delivered over to another coroner. In *Rex v. Evett* (d), the Court said, "It is essential to state the place of death and the finding of the body, in order to originate the jurisdiction of the coroner." That could not be a defect in substance if it depended on where the blow was given; for, in that case, that would be the only material allegation. In *Rex v. Clarke* (e), it appears that a coroner is not bound to take an inquisition till sent for by the township: and there is a precedent of an indictment against a township for a misdemeanor in burying a body without notice to the coroner (f). From these it appears that he is the proper officer to originate proceedings; and there is no autho-

(a) April 30th, before Lord Denman, C. J., Patteson, Williams, and Wightman, Js.

(b) It was also objected, 1st, that the cause of death was ambiguously stated in the inquisition; and 2nd, that there was no sufficient finding of the deodand; but,

as the judgment of the Court did not proceed upon either of those points, the argument is omitted.

(c) 11 A. & E. 128, note (a) to *Reg. v. Brownlow*, Id. 119.

(d) 6 B. & C. 247; 9 D & R. 237.

(e) 1 Salk. 377.

(f) 2 Chitt. Cr. L. 256.

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urity to shew, that, having done so, he is to abandon them, and send the body to the coroner of the place where the blow was given.

The 2 & 3 Edw. 6, c. 24, was passed to remedy certain defects in the common law. The title and preamble of that act are material: it is intituled, "An Act for the Trial of Murders and Felonies in several Counties," and reciting (s. 2), "that it often happeneth and cometh in use, that a man is feloniously stricken in one county, and after dieth in another county, in which case it hath not been founden by the laws or customs of this realm that any sufficient indictment thereof can be taken in any of the said two counties," enacts, "that where any person hereafter shall be feloniously stricken or poisoned in one county, and die of the same stroke or poisoning in another county, then an indictment thereof, founden by jurors of the county where the death shall happen, before the coroner, justices, &c., shall be as good and effectual in the law as if the stroke or poisoning had been committed and done in the same county where the party shall die, or where such indictment shall be so founden." The effect of that statute is clearly to give a coroner of a county where a person died, though stricken in another, jurisdiction to inquire. Lord Hale (a) agrees that such was the law before the passing of that act; and it would be an erroneous distinction to say, that, admitting this construction to be right, it is only applicable to coroners of counties. Even without that statute the coroners of counties or of limited jurisdictions would have a right to *inquire* into the cause of deaths, especially *per infortuniam*, and all the statute does is, to enable them to institute criminal proceedings. The first principle of this law is, that an inquisition should be held *super visum corporis*, which in such case could not be without some mode of compelling the removal of the body. Deodands have

(a) 1 Hale, P. C. 426.

no connexion with the principles of criminal law. It was lately decided in *Regina v. Polwarth* (a), that no deodand accrues in the case of felonious killing.

It will, perhaps, be contended, that, if reference to the statutes is necessary, a modern case decided on a statute *in pari materia* (7 Geo. 4, c. 64, s. 12 (b)) is analogous to, and will be binding on, this case. That statute enacts that offences committed on, or within 500 yards of the boundary of two counties, or begun in one county and completed in another, may be tried in either county. And in *Rex v. Welsh* (c) it was decided that that provision is confined to county boundaries, and prosecution in counties, and does not apply to limited jurisdictions; and that decision was no doubt correct, the word "counties" being so expressly used by the statute. But, besides that the rules of construction of modern statutes are very different from the old, the Municipal Corporation Act (5 & 6 Will. 4, c. 76, s. 62), providing for their appointment, clearly gives an *exclusive* not a *concurrent* jurisdiction to the coroners of boroughs. It enacts that "none thereafter shall take any inquisition which belongs to the office of coroner within such borough, save only the coroner so from time to time to be appointed."

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There are also similar instances to be found, not indeed of a borough, but of a limited jurisdiction; as in the case of the coroners of the royal household, called the coroners of the verge, appointed by the Lord Steward, under 33 Hen. 8, c. 12; as to whom Lord Hale, C. J., says (d), that because the King's Court was moveable often, by the Statute of *Articuli super chartas*, cap. 3 (e), it is ordained, "that of the death of a man, the coroner of the county shall join in inquisition to be taken thereof with the coroner of the King's house."... "But yet, in that case of death within the verge, the coroner of

(a) 1 Q. B. R. 818; 1 G. & D. 211. minal Justice in England."
(c) 1 Mood. C. C. 175.
(b) Intituled "An Act for improving the Administration of Criminal Justice in England."
(d) 2 Hale, P. C. 54.
(e) 2 Co. Inst. 550.

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the county cannot take an inquisition without the coroner of the verge, and if he doth, it is void." . . . "But if a murder or manslaughter be done within the precincts of the King's palace, limited by the statute of 33 Hen. 8, c. 12, then by that statute the inquisition shall be taken by the coroner of the household, without the adjoining or assisting of any coroner of the county." Again, in the case of the coroner of the Admiralty, *Lacie's case* (a), where a man was stricken upon the high sea, and died upon the shore after the reflux of the water, is a clear authority to shew that the jurisdiction is where the death takes place and the body is found, and not where the blow causing the death was given.

Kelly, contra.—On the face of this inquisition, the coroner who took it had no jurisdiction. Uudoubtedly the cases cited go to shew, that if the coroner of Reading has no jurisdiction here, no one has; it may be that the law is defective, but that is not the question: it is, whether the coroner who took this inquisition had authority to do it, and to impose a deodand. At common law, the power to impose a deodand, and find a man guilty of murder or manslaughter, was co-extensive, the jurisdiction was the same. That law was found, at a very early period, in many respects defective, as, for instance, where the blow was in one county, and the death in another, there was no jurisdiction; and, until the passing of the 2 & 3 Edw. 6, c. 24, it was doubtful, in the case of a murderer, whether he were indictable or triable in either county (b). The effect of that authority is, that, supposing there to be any jurisdiction at all in this case, it must be by the coroner or magistrates of the county where the wound was given, unless otherwise ordered by statute. So that, down to the time of Edward 6, whether in a case of murder, manslaughter, or accidental

(a) 2 Hale, P. C. 17.

(b) 1 Hale, P. C. 426.

death, there was no jurisdiction, unless the body was removed back into the county where the blow was given. It is clear therefore that there would be no jurisdiction in the coroner of Reading by the common law.

Then, did the statutes from 2 & 3 Edw. 6, c. 24, to 7 Geo. 4, c. 64, make any difference? The effect of them is, that whereas, before, the coroner had no jurisdiction to find murder, manslaughter, or deodand, those statutes do, as to counties, *and counties only*, give magistrates and coroners power to try as to murder and manslaughter; as to deodand, the case remains the same. The recital of the 2 & 3 Edw. 6 is limited to "grievous wrongs and crimes, for that the jurors can take no notice," which clearly shews that the notion of the law then, and the reason for the statute, was that the jury had no power. There is nothing in these statutes to enlarge the power of coroners in cases of accidental death, which remains the same as it was at common law. [*Patteson, J.*—That would seem to make the jurisdiction depend upon the result of the inquisition.] So it does; not as to taking the inquisition, but as to imposing a deodand: the former they might do before, but when they find the blow given in another county, *not feloniously*, their power ceases. If, by the words referred to in the 4 Edw. 1, c. 2, the coroner, as soon as he found *the steps*, might proceed to follow the horse and cart into another county, why should he not be able to do so in a case of felony? and then the subsequent enactments would have been unnecessary. But in that statute there is a provision which is decisive of the question. He is to find the length and breadth of the wound, and *then* proceed with the delivery of the deodand to the towns "as before is said," that is, *within his county*. Originally, the chattel, if not redeemed in time, was so delivered; and that law exists still. If this Company refused to pay the fine, the coroner would not be obliged to resort to the concurrent remedy given by subsequent statutes against the person,

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but might deliver the engine to a town in Berkshire. How can a coroner of another county exercise that power? In the case of *Regina v. The Grand Junction Railway Company* (a) no reason appears why the objection was abandoned: at all events, that is no authority to overrule the doctrine of Lord *Hale*, or to do what is equivalent to an act of Parliament, to give a coroner a power which he has neither by statute nor at common law. *Rex v. Evett* (b) and *Rex v. Clarke* (c) shew that the transaction must be minutely described, and that it is necessary that the jurisdiction of the coroner should appear *in omnibus*; and as he has no jurisdiction unless the body is found in his county, that must appear; but if it appear that one of the ingredients necessary to give jurisdiction took place in another county, that is fatal. In *Lacie's case* (d), referred to in *Bingham's case* (e), it was held that there was no punishment for a murderer under such circumstances. All that can be said therefore is, that here there is a defect in the law which can only be supplied by legislative enactment.

As to the cases relating to the coroners of verge and the Admiralty, they are instances of a limited jurisdiction existing by statute,—without it they could not take cognizance of a death; therefore, unless there were a concurrent jurisdiction, there would be a failure of justice. But *Rex v. Welsh* (f) shews that, where the legislature intended to give increased powers, they gave it to cities. The Municipal Corporation Act does not give any increased jurisdiction, it merely says, that what the coroner of Reading could do before, the coroner appointed under that act shall continue to do. [*Wightman*, J.—At what point do you say the coroner is to stop?] At the moment he finds it is

(a) 11 A. & E. 128, a; 3 P. & D. 57, a.

(b) 6 B. & C. 247.

(c) 2 Bulst. 203.

(d) 25 Eliz. See 2 Hale's P. C. 17, 19.

(e) 2 Rep. 93, a.

(f) 1 Mood. C. C. 175.

not a case of felony. He must begin the inquiry, summon a jury, and examine witnesses; then, if it is proved that the wound was given in another county, there is an end of his jurisdiction at common law; but in cases of felony he may proceed. If, therefore, the power of the coroner is to be considered as increased by the statutes of 2 & 3 Edw. 6, or 7 Geo. 4, it is only to be increased as to coroners of counties, and not of boroughs or other limited jurisdictions.

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Waddington, for the Crown, in reply, cited *Ex parte Carruthers* (a).

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.—The first and principal objection to the inquisition is, that it appears to be taken before the coroner of the borough of Reading, upon the view of a body lying dead within that borough, and upon the oaths of men of that borough: while upon the inquisition itself, it is found that the accident which occasioned the death occurred in the parish of Sonning, in the county of Berks, (not saying within the borough of Reading): yet the jury have found the cause of the death, and that a certain carriage and engine were moving thereto, and that they were of the value of £100.

For the Railway Company it was urged, that the want of jurisdiction appears upon the face of the inquisition. For the Crown it was contended, that there is no such want of jurisdiction, and that on two grounds: first, that at common law, the coroner of the place where a dead body is lying has a jurisdiction to inquire into the death and the cause of it, though both the one and the other should have happened out of his jurisdiction; and, secondly, that at all events such jurisdiction is given by

(a) 2 Mann. & R. 397.

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the statutes of 4 Edw. 1, (*De Officio Coronatoris*), stat. 2, and 2 & 3 Edw. 6, c. 24. It may be convenient to examine the second ground in the first place.

The statute of 4 Edw. 1 is said by Serjeant Hawkins, B. 2, c. 9, s. 21, to be wholly directory, and in affirmance of the common law. It contains no provision whatever respecting the jurisdiction of the coroner as regards place, nor any expression which can be construed into an extension of his power. The statute of 2 & 3 Edw. 6 does expressly provide, (by s. 2), "that where any person shall be *feloniously* stricken or poisoned in one county, and die of the same stroke or poisoning in another county, that then an indictment thereof founden by jurors of the county where the death shall happen, whether it shall be founden before the coroner upon the sight of such dead body, or before the justices of peace, or other justices or commissioners which shall have authority to inquire of such offence shall be as good and effectual in the law, as if the stroke or poisoning had been committed and done in the same county where the party shall die, or where such indictment shall be so founden." The statute then contains similar provisions respecting appeals of murder, and the trial of accessories as well in murder as in other felonies. The words of the second section are confined to cases of *felonious* killing, and the preamble of the act, and all the other sections in it, plainly shew, that the mischief intended to be remedied was, the escape of felons from want of jurisdiction, and nothing else. But it is said that as the jury must determine whether there has been a felonious killing, and as, in all cases of violent death, such felonious killing may exist, the statute incidentally gives power to the coroner to pursue an inquiry into the cause of death in all cases where he has once begun it. This argument justly applies, where there is any suspicion and charge of felony before the coroner, upon which the jury would have to exercise their judgment: but it is observable, that the

act of Parliament seems to assume the existence of the felony, for it makes good an indictment found for feloniously striking or poisoning, but is silent entirely as to what is to be done by the coroner or jury if no such indictment be found. The effect of any other finding seems to be left entirely as it stood at common law.

It is further objected, that the stat. 2 & 3 Edw. 6, speaks only of counties, and that, however it may empower the coroner of the county, in which a dead body lies, to inquire into the cause of death arising in another county, it does not empower the coroner of a borough or other limited jurisdiction so to do. In support of this objection the case of *Rex v. Welsh (a)* was cited, where the Judges held, that the statute 7 Geo. 4, c. 64, s. 12, giving jurisdiction in cases of offences committed within 500 yards of the border of a county, does not extend to offences committed within 500 yards of a borough. The language of the two acts is very similar in the use of the word "county," and we see no reason for putting a different sense upon it in this case from that which the Judges adopted in the case cited. For this reason therefore, as well as the other above-mentioned, we think that the statute of 2 & 3 Edw. 6 does not apply.

It remains to consider what jurisdiction the coroner had at common law. It is laid down in 1 Hale's Pleas of the Crown, 426, that "at common law, if a man had been stricken in one county and died in another, it was doubtful whether he were indictable or triable in either; but the more common opinion was, that he might be indicted where the stroke was given, for the death is but a consequent, and might be found though in another county;" and he cites the 9 Edw. 4, c. 68, and 7 Hen. 7, c. 8. "And if the party died in another county, the body was removed into the county where the stroke was given, for the coroner

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(a) 1 Mood. C. C. 175.

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to take an inquest *super visum corporis*," under the 6 Hen. 7, c. 10, "but now by the statute of 2 & 3 Edw. 6, c. 24, the justices or coroner of the county where the party died, shall inquire and proceed, as if the stroke had been given in the same county where the party died." Again, in Vol. II. p. 66, Lord *Hale* says, "And therefore in ancient times, if a man were hurt in the county of A., and died in the county of B., the coroner of the county of B. could not take an inquisition of his death, because the stroke was not given in the county, nor could the coroner of the county of A. take an inquisition, because the body was in the county of B., but they used to remove the body into the county of A., and there the coroner of that county was to take the inquisition;" and for that he cites 6 Hen. 7, c. 10, as before. Again, the statute of 2 & 3 Edw. 6, in the preamble, distinctly states, that in such case, "it hath not been founden by the laws or customs of this realm, that any sufficient indictment thereof can be taken in any of the said two counties, for that, that by the custom of this realm, the jurors of the county where such party died of such stroke can take no knowledge of the said stroke, being in a foreign county, although the same two counties and places adjoin very near together; the jurors of the county where the stroke was given cannot take knowledge of the death in another county, although such death most apparently come of the same stroke." The same law is laid down very pointedly in 1 Hale's Pleas of the Crown, p. 426, as to the jurisdiction of the Admiralty at common law: in such cases, "if a mortal stroke be given on the high sea, and the party comes to land in England and dies, the admiral shall not have jurisdiction in this case to try the felon, because the death that consummated the felony happened upon the land, nor the common law shall not try him, because the stroke that made the offence was not *infra corpus comitatûs*;" and he cites 5 Rep. 106, b. *Sir Henry Constable's case*, 2 Co. Rep. 98, a. *Bingham's case*,

Co. P. C. p. 48, and *Lacie's case*, 25 Eliz., cited there to that purpose. After these authorities, it is startling to hear it asserted broadly at the bar, that if a mortal stroke be given in the county A., and the party go to and die in the county B., and the body after death be taken to the county C., the coroner of the county C. may hold an inquest and inquire into the whole matter, and that by the common law. No authority is cited for such assertion, and in truth there is no foundation for it. The mere fact of a body lying dead does not give the coroner jurisdiction, nor even the circumstance that the death was sudden "there ought, at least, to be a reasonable suspicion that the party came to his death by violent or unnatural means." 1 East's Pleas of the Crown, 382, citing three MS. cases: and also see *Rex v. The Justices of Kent (a)*, and *Rex v. The Justices of Norfolk (b)*, which is one of the cases cited in East's Pleas of the Crown.

The coroner must, therefore, before he summons a jury, make some inquiry, and if on that inquiry he finds that the circumstances which occasioned the death have happened out of his jurisdiction, and that there is no reasonable suspicion of murder or manslaughter, he ought to abstain from summoning a jury, and the body, in order to an inquest being holden, must be removed into the county where the circumstances took place. If, however, the coroner has no reason to suspect murder or manslaughter to have been committed, or if it appears on inquiry by him that the circumstances occurred out of his jurisdiction, and no murder or manslaughter is suspected, the coroner must stop the proceedings and discharge the jury. This is what he would have been obliged to do before the statute 2 & 3 Edw. 6, in all cases where such circumstances appeared; and this he must do still, unless it be a supposed case of murder or manslaughter, when he must proceed until the jury find their verdict. If the verdict be death

(a) 11 East, 229.

(b) 1 Nol. 141.

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by the visitation of God, nothing more is done; for in truth it appears that there was no occasion for an inquest. If the verdict be murder or manslaughter, then the want of jurisdiction at common law, if any, is cured by the statute 2 & 3 Edw. 6. If the verdict be *per infortunium*, then the coroner (that is, by the jury) "is to inquire of the deodand, and the value, and in whose hands, and to seize and deliver the same to the township to be answerable for the same to the king, by the statute 4 Edw. 1. (*De Officio Coronatoris*).” See 2 Hale’s Pleas of the Crown, 62. But this supposes that the circumstances which occasioned the death happened within his jurisdiction, and that the deodand to be seized is also within his jurisdiction. If the facts be otherwise, as in this case, then the finding of the deodand, at all events, is merely void; but, as a want of jurisdiction appears upon the face of the proceedings, we are of opinion, that the whole inquisition is void.

We do not enter into any question as to the validity of the inquisition in other respects, but on the ground of want of jurisdiction the rule to quash it must be made absolute.

Rule absolute (a).

(a) Since the decision of the above case, the 6 & 7 Vict. c. 12, has been passed, (11th April, 1843), providing that the coroner only, within whose jurisdiction the body is lying, shall hold the inquest.

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COURT OF COMMON PLEAS.

In Trinity Term, 1842.

HEWITT v. PRICE.

May 30.

ASSUMPSIT for the breach of an agreement for the sale of certain shares in a Railway Company. Pleas, 1, plaintiff not possessed; 2, plaintiff not the registered owner of the shares; 3, that plaintiff was not ready to transfer, as in the declaration alleged.

Contracts for the sale of railway shares are not within the Stock Jobbing Act, 7 Geo. 2, c. 8.

Bompas, Serjt., (a), moved for leave to add another plea, in order to raise the question whether a contract for the sale of railway shares is not illegal under the Stock Jobbing Act, 7 Geo. 2, c. 8 (d). *Erskine*, J., at Chambers, had re-

(a) Before *Tindal*, C. J., *Cokeman*, *Moule*, and *Cresswell*, Js.

(b) Sect. 5. "And for preventing the evil practice of compounding or making up differences for stocks or other securities bought, sold, or at any time hereafter agreed so to be; be it enacted, that no money or other consideration whatsoever (except as hereinafter provided) shall be voluntarily given, paid, had, or received for the compounding, satisfying, or making up any difference for the not delivering, transferring, having, or receiving, any public or joint stock or other public securities, or for the not performing of any contract or agreement so stipulated, and agreed to

be performed; but that all and every such contract and agreement shall be specifically performed and executed on all sides, and the stock or security thereby agreed to be assigned, transferred, or delivered, shall be actually so done, and the money or other consideration thereby agreed to be given and paid for the same shall also be actually and really given and paid; and all and every person and persons whatsoever, who shall voluntarily compound, make up, pay, satisfy, take or receive such difference, money, or other consideration whatsoever, for the not delivering, transferring, assigning, having, or receiving such stock or other security so to be

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fused to allow it, being probably influenced by the case of *The London Grand Junction Railway Company v. Freeman (a)*, but that was a question upon the Bubble Act, 6 Geo. 1, c. 18, s. 18. A Railway Company is a Joint Stock Company within the contemplation of sect. 5 of 7 Geo. 2, c. 8, as South Sea Stock has been held to be. [*Tindal*, C.J. —That was funded at the time, and therefore the act was passed to protect it. *Cresswell*, J.—Omnium has been held to be stock, because “a person who has omnium is potentially in possession of stock.” *Oliverson v. Coles (b)*]. The statute was intended to guard against any jobbing of this kind; it speaks of joint stock as well as public securities. [*Maule*, J.—In *Wells v. Porter (c)*, the statute was held to intend only the public stocks of this country; and *Tindal*, C.J., says, “This statute involves many penal consequences; one, that, after a party has become liable to the penalty imposed by the act, he may be put upon his oath touching the offence. I cannot think that a statute so penal is to be enlarged beyond the strict subject-matter to which it relates. We ought not, therefore, to enlarge it by any intendment.” And on that view the Court decided, and the principle is strictly applicable to this case.]

agreed to be delivered, transferred, assigned, had or received as aforesaid, except in the manner herein-after provided, shall forfeit and pay the sum of one hundred pounds, to be recovered by action of debt,” &c.

Sect. 6 enacts, “That no person or persons who shall sell any public or joint stock or other public securities to be delivered and paid for on a certain day, and which shall be refused or neglected to be paid for according to such agreement, shall be obliged to transfer the same; but it shall and may be lawful for such person or persons to

sell such stock, or other securities which shall be so refused or neglected to be paid for to any other person or persons, for the best price which can be obtained, and after such sale to receive (if the parties can agree) or to recover as aforesaid from the person or persons who first contracted for the same all the damage which shall be sustained thereby.”

(a) Ante, vol. 2, p. 468.

(b) 1 Stark. 496; and see *Brown v. Turner*, 2 Esp. 631.

(c) 2 Bing. N. C. 722; 3 Scott, 141.

TINDAL, C. J.—I think that what fell from the Court in that case is decisive. I cannot give you much hope of success.

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Bompas, Serjt., declined to take a rule.

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May 31.

THIS was a motion for a rule to set aside the judgment and all subsequent proceedings in the above action, brought to recover the amount of certain calls due from the defendant to the Company. It was moved upon an affidavit of the defendant, which stated, that on the 2nd of December, 1841, the attorney for the plaintiffs applied to him for payment, stating that he was instructed to do so by the directors of the Company. That a writ of summons was issued on the 15th of December, in the name of the Company, and that judgment was signed by default on the 10th of March, 1842. That he could not ascertain, during the progress of the action, upon whose authority the action was brought; but that, within a week of the present application, he had

By the 6 & 7 Will. 4, c. cviii, it is enacted, (s. 108) that the business of the Company shall be carried on under the management of *twelve* directors, to be chosen from time to time from certain qualified proprietors, who shall have the general management, &c., of the business of the Company, the custody of, and

power to use their common seal, and to do all things necessary for carrying on the business, to enforce the powers, &c., and to bind the Company, as if the same were done by the whole corporation. By s. 109, nine persons are named as the first directors, and provision is made for their retiring by rotation, and the election of *twelve* new directors. Sect. 112 enacts, that when any vacancy shall occur by death or any other means than by going out of office by s. 109, (i. e. by rotation), it shall be lawful for the remaining directors to elect some other qualified proprietor to be a director. By s. 116, *five* directors are sufficient to constitute "a Court of directors." And by s. 123, it is enacted, that if any proprietor neglect to pay his calls, it shall be lawful for the said Company to sue for and recover the same.

In an action brought by the Company against a proprietor for calls, the defendant suffered judgment by default on the 10th of March, and on the 31st of May moved to set aside the judgment, on the ground that there were only seven directors; who therefore had no authority to bring an action.

Held, that the objection was at all events too late, and that, if the absence of the full number of directors was an answer to such action, it ought to have been pleaded.

But *semble* that the clause (s. 108), as to the business of the Company being under the management of *twelve* directors, is directory only.

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discovered that the directors were only seven in number. That he had seen several letters of the secretary, and had received one from him admitting that fact.

Bompas, Serjt., in support of the motion (a).—Under this railway act (b), the Company are to be under the

(a) Before *Tindal*, C. J., *Coltman*, *Maule*, and *Cresswell*, Js.

(b) The 6 & 7 Will. 4, c. cviii, enacts—

Sect. 108. "That the business and concerns of the said Company shall be carried on under the management of twelve directors to be chosen from time to time from amongst the proprietors for the time being of the said Company qualified by holding ten shares or upwards each; and such directors shall have the general management, direction, superintendence, and control of the business and concerns of the said Company, and the custody of the common seal of the said Company, with power to use the same on their behalf, and also the custody of the books of account, and other books, deeds, and papers, and shall have power to direct the investment, calling in and laying out, sale and disposal of the stocks, effects, funds, monies, and securities of the Company, and all other the dealings of the Company, and to call and appoint the times and places of holding general and other meetings of the proprietors, and to superintend, direct, and control the correspondence and mode of keeping the accounts, and the ascertainment of dividends and the profits on shares, and to do all other things necessary or to be deemed

by them proper or expedient for carrying on the business and concerns of the Company, and to enforce, perform, and execute all the powers, authorities, privileges, acts, and things in relation to the said Company, and to bind the said Company as if the same were done by the whole corporation, except such as are hereby required to be done at some general or special meeting of the said Company; and the directors for the time being shall have power to frame rules and regulations, and prescribe the orders and directions for carrying on the business and concerns of the said Company, and alter and vary the same from time to time as they, in their discretion, shall think fit; and all such rules and regulations shall have the force of bye-laws provided the same be not repugnant to any of the provisions of this act, nor to any bye-laws which may have been duly passed at any general or special meeting of the proprietors of the said Company; and no individual proprietor, not being a director, (except as hereinafter provided), shall have a right to any interference, management, direction, or control in or over the business and concerns of the said Company, or the capital stock or effects thereof."

Sect. 109. "That [nine indivi-

management of twelve directors; here there are only seven: therefore there are no proper parties to the action

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duals therein named] shall be, and they are hereby appointed, the first or present directors of the said Company under this act, and they shall, unless they or either of them shall sooner die, resign, or become disqualified as hereinafter mentioned, continue in office until the first general meeting of the said Company to be held next after the passing of this act; and at such last-mentioned meeting all the said directors shall go out of office, and twelve directors shall be elected in their place and stead, who shall continue in office until the first half-yearly meeting of the said Company in the year 1838; and at such first half-yearly meeting in the year 1838, three of the directors who shall have been so elected as aforesaid (to be determined by ballot amongst themselves) shall go out of office; and, at each first half-yearly general meeting in the three following years, three of the directors who shall have been so elected as aforesaid (to be determined by ballot amongst themselves) shall go out of office, and at each first half-yearly general meeting in every subsequent year, the three directors who shall have been longest in office since their last election shall go out of office; and at every general half-yearly meeting, at which three directors are to go out of office as aforesaid, three new directors shall be elected."

Sect. 110. "Proviso, that, notwithstanding anything hereinbefore contained to the contrary, any di-

rector, who shall by ballot or rotation go out of office as aforesaid, may be immediately, or at any future time, re-elected by the said Company as a director of the said Company; and, after such re-election, he shall, with reference to the going out in rotation, be considered as a new director."

Sect. 111. "Proviso, that no person holding any office, place, or employment, or being concerned or interested in any contract under the said Company, shall be capable of being chosen, or, being so chosen, of continuing a director of the said Company; nor shall any director be capable of accepting any office, place, or employment, or of taking or being concerned or interested in any contract under the said Company; and in either of the said last-mentioned cases the party so offending shall forfeit the sum of £50 during the time he shall be a director of the said Company; and, if any director of the said Company shall at any time subsequent to his election accept or continue to hold any other office or place of trust or profit under the said Company, or shall either directly or indirectly be concerned in any contract with the said Company, or shall participate in any manner in any work to be done for the said Company, or shall at any time cease to be a proprietor of ten shares at least in the said undertaking, the office of such director shall thereupon become vacant, and he shall thenceforth be disqualified from voting or acting at

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which has been brought in the name of the Company without any authority. [*Cresswell, J.*—Does the act say

any succeeding meeting of directors: provided, nevertheless, that, until the disqualification of any director shall have been communicated to and recorded by a court of directors, every act and proceeding, to which such disqualified director shall have been a party, shall be as binding and effectual as if no such disqualification had taken place: provided also, that it shall be lawful for any general meeting to exempt any particular person or persons from the operation of this present clause, in case they shall deem it advantageous to do so."

Sect. 112. "That when and so often as any director, to be elected by virtue of this act, shall die, or resign, or become disqualified or incompetent to act as a director, or shall cease to be a director by any other means than by going out of office as aforesaid, it shall be lawful for the remaining directors to elect some other proprietor, duly qualified as aforesaid, to be a director; and every such proprietor so elected to fill up any such vacancy shall continue in office so long only as the person in whose place or stead he may be elected would have been entitled to continue in office, had he lived and remained in office."

Sect. 116. "That the directors for the time being of the said Company shall meet together at the office of the said Company once at least in every two calendar months, and at such other times as they

shall be convened as hereinafter mentioned; and each of such meetings shall be styled a "court of directors;" but no meeting of directors shall be deemed a court competent to enter and determine upon business, unless at least five directors shall be present at the commencement of the business, and when a decision takes place upon the whole or any part of the business; and if on the day appointed for such meeting a sufficient number of directors to constitute a court shall not attend, then and in every such case the said meeting shall be adjourned to the next or some subsequent day by the directors then present, but if none be present, then by the secretary of the said Company, or such other person as shall attend in his place; and any director shall be at liberty to call an extraordinary meeting of directors, upon such notice and in such manner, and to consist of at least such number (not being less than five) as shall from time to time be provided by the bye-laws of the Company, or the orders of the court of directors," &c.

Sect. 118. "That the directors shall have full power from time to time to make such calls of money from the several subscribers to, and proprietors for the time being of, the said undertaking, not exceeding in the whole, including the sums already paid in respect of such share, the sum of £50 for each share, as they shall from time to time find necessary for the purposes

twelve directors shall join to bring an action?] Not in terms, but when there are not twelve, there is no body competent to take such a step. If there are twelve, and

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of the said undertaking, so that no such call shall exceed the sum of £5 upon each share in the said undertaking, and so that the total amount of such calls in any one year shall not exceed £20 upon each share, and that there shall be an interval of three calendar months at least between every two successive calls, and that such several sums of money so to be called for shall be paid into such bank or banks, or to such person or persons, and at such time and place, and in such manner as the said directors shall from time to time order and appoint, of which time and place twenty-one days' notice shall be previously given by advertisement, under the hand of the secretary for the time being, inserted in two or more London newspapers, and in one or more newspaper or newspapers usually circulated in the said county of Essex."

Sect. 119. "That the court of directors for the time being shall have full power and authority to use the common seal on behalf of the said Company, and all contracts in writing relating to the affairs of the said Company, which shall be signed by any three of the directors in pursuance of a resolution of a court of directors, shall be binding on the said Company and all other parties thereto, their respective successors, heirs, executors, and administrators, and actions and suits may be maintained thereon, and damages and costs recovered by or

against the said Company or any other parties thereto failing in the execution thereof."

Sect. 123. "That the several parties who have subscribed, or who shall hereafter subscribe, for or towards the said undertaking, and every proprietor of any share in the said undertaking, shall pay, and they are hereby required to pay, the respective sums of money by them respectively subscribed for, or such parts or proportions thereof as shall from time to time be called for by the directors by virtue of, and pursuant to, the powers and authorities of this act, to such persons, and at such times and places as the directors shall from time to time in manner hereinbefore mentioned direct and appoint; and if any proprietor of any such shares shall refuse or neglect to pay his rateable proportion of the money so to be called for, at such time and in such manner as aforesaid, then and in such case, and so often as the same shall happen, such proprietor shall pay interest for the same after the rate of £5 per centum per annum from the day appointed for payment thereof up to the time when the same shall be actually paid; and if any proprietor of any such share shall neglect or refuse so to pay such his rateable proportion, together with interest (if any) accruing for the same, for the space of one calendar month next after the day appointed for the payment thereof

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five only attend, they are competent to act, but the undertaking must be under the management of twelve; and if they do not exist, some step should be taken to replace them.

[*Maule, J.*—There may not be so many holding ten shares each. This might be a good ground for a *mandamus* to fill them up, but you cannot set aside proceedings for default of that number. Or if this were an application made by the shareholders who did not choose to let these directors act for them, it might be sufficient; but here the Company acquiesce.] No competent authority has ordered these proceedings; they are taken irregularly, therefore a defendant may appear at any time to set them aside. [*Tindal, C. J.*—This is quite an act they might adopt; it does not appear they are not filled up.] During the progress of the action there were only seven. [*Cresswell, J.*, Section 123 says, "it shall be lawful for the Company to sue."] Every action is by the Company, but the directors have the management, and unless they are twelve, they are legally incapable of acting; they might break it up. [*Coltman, J.*—There is no irregularity upon the face of the proceedings to justify our setting them aside. Would not payment to these seven be sufficient?] No more than in the case of a private individual acting without authority. The employment of an attorney is one of the most important things to be ordered by the directors; and, if an attorney commences an action without authority, there is no irregularity on the face of the proceedings, yet the Court will set them aside. Here the defendant, if he pays these calls, may be obliged to pay them over again.

TINDAL, C. J.—This is confessedly a case of the first im-

as aforesaid, then it shall be lawful for the said Company to sue for and recover the same, with full costs of suit, in any of his Majesty's Courts of record, by action of

debt, or on the case, or by bill, suit, or information, wherein no es- soign, wager, or protection of law, nor more than one imparlance shall be allowed."

pression. No precedent has been cited to shew that such an application has ever been made; and certainly it comes at a very late period. The defendant suffered judgment by default on the 10th of March. He had all the means of knowledge then that he has now, touching the management of the Company; but he has suffered the whole of last, and a considerable portion of this Term to pass by without moving the Court. Under these circumstances, we ought to be well satisfied that he is entitled to the relief he seeks, before we accede to it. But I must confess that I see no ground whatever for the application. The action is brought to recover calls, which the defendant, by suffering judgment by default, has admitted to be due to the Company. It is provided, by s. 123, that the calls when due shall become a debt due from the proprietor of shares, and the Company are empowered to sue for and recover the same. It appears that the Company have sued, and that the defendant is a proprietor of shares; we have therefore the proper parties before us. What however is now sought by the defendant to be engrafted upon the provisions of that section is, that by another clause of the act, (sect. 108), all the business and concerns of the Company are committed to the management of twelve directors, to be chosen from the proprietors. But this appears to me to be matter, not of condition, but of direction only. If at any time the number of directors falls short of twelve, perhaps a *mandamus* might be issued to compel the Company to choose others to fill up the vacant places. If the non-existence of the proper number be an answer to the action, if seven were not in a condition to sue at all, that objection ought to have been taken by plea, and the question would have come regularly before the Court upon demurrer. But this being an application to the equitable jurisdiction of the Court, as we have the proper parties to the record before us, as the debt is admitted to be due, the defendant's liability is not denied,

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and he comes so late, I think this rule should not be granted.

COLTMAN, J.—This is an application to the summary jurisdiction of the Court, which ought not to be exercised except for the purpose of furthering justice. I am by no means satisfied that justice would be furthered by our granting this rule. The defendant admits that the debt is due, and unless he could be called upon to pay it over again, no injustice is done to him by his being compelled to pay the amount claimed in this action. But payment in this action would clearly be a good answer to any future demand on the part of the Company for the same calls.

MAULE, J.—I am of the same opinion. I do not think that the act, when looked at closely, even requires that there shall at all times be the full number of twelve directors. Sect. 108 enacts, “that the business and concerns of the Company shall be carried on under the management of *twelve* directors, to be chosen from time to time from amongst a particular class of proprietors, and that such directors shall have the general management, direction, superintendence, and control of the business and concerns of the Company, and the custody of the common seal of the Company, with power to use the same on their behalf, &c., and to do all other things necessary or to be deemed by them proper or expedient for carrying on the business and concerns of the Company, and to enforce, perform, and execute all the powers, authorities, privileges, acts, and things in relation to the said Company, and to bind the said Company, as if the same were done by the whole corporation, &c.” By sect. 109, nine individuals are named as the first directors, and provision is made for their retirement by rotation, and the election of new directors, the number of such new directors to be *twelve*. Sect. 110 authorizes the re-election of former directors. Sect. 111

disqualifies certain proprietors from being chosen directors. Then sect. 112 enacts, "that, when and so often as any director to be elected by virtue of this act shall die, or resign, or become disqualified or incompetent to act as a director, or shall cease to be a director by any other means than by going out of office as aforesaid," (that is, by rotation, s. 109), "*it shall be lawful* for the remaining directors" (not the proprietors) "to elect some other proprietor duly qualified as aforesaid to be a director; and every such proprietor so elected to fill up any such vacancy, shall continue in office so long as the person in whose place or stead he may be elected would have been entitled to continue in office, had he lived and remained in office." By this clause the directors are empowered temporarily to fill up vacancies occurring in their body; if they like to do it, they may; but I do not understand the clause as making it compulsory on them so to do: it is left to their discretion. It may be that the number of seven directors is enough, a perfectly statutable number: by sect. 116, five are sufficient to constitute "a court of directors." At all events, this is merely a matter affecting the internal regulation and management of the affairs of the Company; if the number is insufficient for that purpose, the proprietors may possibly by *mandamus* compel the directors to supply the vacancies. It can however have nothing to do with the external affairs of the Company, or with their power to enforce the payment of calls that have been duly made; and I see no ground which the defendant has for complaint. For these reasons, I think the present application ought not to succeed.

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CRESSWELL, J., concurred.

Rule refused.

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COURT OF QUEEN'S BENCH.

In Trinity Term, 1842.

June 13.

THE QUEEN v. THE EASTERN COUNTIES RAILWAY COMPANY.

After argument and judgment on a return to a *mandamus*, the Court will, as a *general* rule, give costs to the party succeeding, under stat. 1 Will. 4, c. 21, s. 6.

IN this case, judgment having been given for the defendants (*a*), a rule *nisi* was obtained by them in Easter Term, calling upon the prosecutors (the Commissioners for paving Christ Church, Spitalfields) to shew cause why they should not pay costs to the defendants.

Sir *F. Pollock*, Attorney-General, and *Warren* now shewed cause (*b*), and contended that the point having been a doubtful one, and the Commissioners having taken the proceedings *bond fide* in the exercise of a public duty, it was a case for the Court in their discretion not to grant costs. They cited *Rex v. The Lord of the Manor of Oundle* (*c*), *Rex v. The Commissioners of the Harbour of Rye* (*d*), *Regina v. The Lady of the Manor of Dullingham* (*e*).

Sir *W. Follett*, Solicitor-General, and *Butt*, contra.—The granting of costs after argument upon a return to a *mandamus* is discretionary, but the Court, in the exercise of that discretion, have made it almost a general rule, that where the party succeeding is not to blame, he recovers

(*a*) *Antè*, p. 22.

(*b*) Before Lord *Denman*, C. J.,
Patteson, *Williams*, and *Coleridge*,
J^s.

(*c*) 1 A. & E. 299, n. (*e*).

(*d*) 5 B. & Ad. 1094, n.

(*e*) 8 A. & E. 871, n.

his costs. *Regina v. The Mayor, &c., of Newbury* (a). [Patteson, J.—But not in *Rex v. The Commissioners of the Thames and Isis Navigation* (b).] That was a very peculiar case, and was cited in *Regina v. The Mayor, &c., of Newbury* (a), as also was *Rex v. The Lord of the Manor of Oundle* (c). These costs are incurred in the defence, not in the prosecution of a *mandamus*, which makes the claim stronger.

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Lord DENMAN, C. J.—We think the general rule must apply in this case.

Rule absolute.

(a) 1 Q. B. R. 751. (b) 5 A. & E. 804. (c) 1 A. & E. 299, n. (c).

Sittings after Trinity Term, 1842.

THE QUEEN v. SCOTT and Others.

June 21.

INDICTMENT for a misdemeanor, found at the Leeds Quarter Sessions against the defendants, the servants of the Manchester and Leeds Railway Company. The third count stated, that, upon the 1st day of August, in the 4th year &c. (4 Vict.), there was, and from thence hitherto has been, and still is, to wit, at the township of Rastrick, &c., a certain

By a Railway Act (6 & 7 Will. 4, c. clx.) a Company was empowered (s. 94) to divert or alter the course of any roads or ways, in order the more conveni-

ently to carry the same over or under or by the side of the said railway. By s. 97, it was enacted that in all cases, wherein, in the exercise of such power, any part of any carriage road, &c., should be found necessary to be cut through, raised, sunk, taken, or so much injured as to be impassable or inconvenient for passengers or carriages, &c., or to the persons entitled to the use thereof, the Company should, at their own expense, before any such road &c. should be so cut through, &c., cause a good and sufficient carriage road &c. to be set out and made instead thereof, as convenient for passengers and carriages as the former road, or as near thereto as might be.

The Company had diverted a highway, and obstructed the old road by building a wall across it, and had made a new road, which was neither as convenient to the public as the old one, nor as near thereto as might be.

Held, that they were indictable, in the common form, for so obstructing the highway.

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common and Queen's highway, leading from &c., to &c., for all the liege subjects of the Queen to go, return, pass, re-pass, &c., with horses, coaches, carts, and carriages, &c. along the same, at their free will and pleasure ; and that the said Henry Scott, &c. on &c., unlawfully and injuriously did place and lay and heap up divers large quantities, to wit, five hundred tons of rubbish and stones, in and upon the said highway ; and erect and make, in and upon the same highway, a certain wall, to wit, a wall of stones and other materials, and unlawfully and injuriously did keep and continue the same quantity of rubbish and stones so heaped up, and the said wall so erected and made as aforesaid in and upon the said highway, for a long space of time then next following, to wit, &c., by means of which &c., the said highway was greatly incumbered and obstructed, so that the liege subjects, &c., could not go, return, pass, and repass, &c., through and along the said highway as they were wont and accustomed to do, to the great damage and common nuisance &c. The fourth count was similar, except that it omitted the charge of continuing the nuisance. Plea, not guilty.

The indictment was removed by the defendants into the Court of Queen's Bench by certiorari ; and at the trial before *Maule, J.*, at the York Spring Assizes, 1841, it appeared from the evidence, that the line of railway crossed an ancient highway called Gorder Lane, leading from Rastrick to Bird's Royd ; and that it was originally intended that the railroad should cross the highway upon a level. That intention however was afterwards abandoned, and instead thereof a part of Gorder Lane was diverted, and a wall was built across Gorder Lane at that part of the old line of road which touched the railway, which was the nuisance complained of in the third and fourth counts of the indictment, preferred on the prosecution of the surveyors of the highways. Many witnesses were called, and a great contest was made at the trial, whether the Company had or

had not complied with the provisions of their act (6 & 7 Will. 4, c. cxi) (a); and whether, in making the division, they had given the public a road as convenient for passengers and carriages as the former road, or as near thereto as might be. The jury however found the defendants guilty upon the third and fourth counts.

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In Easter Term, 1841, *Atcherley*, Serjt., prayed the judgment of the Court, whereupon

Cresswell moved for a rule to shew cause why there should not be a new trial, on the ground that the verdict was against evidence, that the Company had only the alternative of diverting the road, or allowing it to cross the railway on a level; that from the peculiar position and cir-

(a) Sect. 94 enacts, "that for the purposes and subject to the provisions and restrictions of this act, it shall be lawful for the said Company (*inter alia*) to divert or alter the course of any roads or ways, or to raise, sink, or deepen any roads or ways in order the more conveniently to carry the same over or under or by the side of the said railway."

Sect. 97 enacts, "that in all cases, wherein, in the exercise of any of the powers hereby granted, any part of any carriage or horse-road or foot-road, railway or tram-road, &c., either public or private, shall be found necessary to be cut through, raised, sunk, taken, or so much injured as to be impassable or inconvenient for passengers or carriages, &c., or to the persons entitled to the use thereof, the said Company shall, at their own expense, before any such

road &c. shall be so cut through, raised, sunk, taken, or injured as aforesaid, cause another good and sufficient carriage or horse road &c. (as the case may require) to be set out and made instead thereof, as convenient for passengers and carriages as the said road &c. to be cut through, raised, sunk, taken, or injured as aforesaid, or as near thereto as may be, and shall cause the same to be put into good and substantial order and condition, where the former road cannot be more easily restored, and where the road cut through, raised, sunk, taken, or injured, shall be a turn-pike road, the substituted road, if temporary, shall be set out and made as aforesaid, and the principal road shall be restored within six months after the commencement of the operation, &c."

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cumstances of the place in question, it was impossible for them, unless in violation of the terms of the statute, to make the diversion without incroachment; and that having made their railway in the parliamentary line, if it was not made according to the powers and provisions of the act, they were not liable to be indicted for the obstruction to the highway, but should have been proceeded against by mandamus.

Sir *F. Pollock*, Attorney-General, *Atcherley*, Serjt., *Addison*, and *Watson* shewed cause (a):—An indictment will lie for this nuisance, therefore it is immaterial to consider whether a mandamus would have been a proper or a sufficient remedy to compel the Company to do what is here required of them. Whether the Company have so complied with the requisition of the act, in substituting the new way for the old, as to furnish an answer to this indictment, was a question for the jury, and they, having found against the Company, in effect say that they have not complied with the condition of s. 97, and had therefore no power to divert the road; and there was ample evidence to support such a verdict.

Sir *W. Follett*, Solicitor-General, *Baines*, and *Tomlinson*, contra.—This indictment is in the common form for obstructing a highway, and the evidence by which it is sought to be established is, that in diverting a road, which the Company are empowered to do by section 97 of their act, they have not given so good a substituted road as the old one. If therefore they are indictable at all, it should have been for that specific offence, and all the facts of the case should have been stated on the record. But the indictment is not maintainable in such a case; because, where a Company, in

(a) June 4th, before Lord Denman, C. J.; *Patteson*, *Williams*, and *Coleridge*, Js.

making such deviation, have done all that has been done under the powers of their act, they are not indictable for not doing something more which the act would empower them to do. If their proceedings were contrary to their act, an injunction to restrain them would be the proper remedy. If they have not done all that is required of them, a mandamus should have been applied for to compel them, as in *Regina v. The London and Birmingham Railway Company (a)*, where, under similar circumstances, a writ issued commanding the Company to set out a good and sufficient road.

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At all events, the verdict is against evidence, and the jury ought to have taken into consideration the greater convenience gained to the public by the proceedings of the Company, as it is said by *Parke, J.*, in *Rex v. Pease (b)*, "There is nothing unaccountable or inconsistent in supposing that the legislature intended that the part of the public which should use the highway should sustain some inconvenience for the sake of the greater good to be obtained by other parts of the public, in the more speedy travelling and conveyance of merchandize along the new railroad."

Cur. adv. vult.

LORD DENMAN, C. J., now delivered the judgment of the Court.—This was an indictment, tried at York, in which there has been a conviction for a nuisance. The defendants pleaded, not guilty, and proved upon the trial, that the obstruction was caused in the exercise of certain powers conferred upon the Manchester and Leeds Railway Company by their act of incorporation. The Company made an offer to remedy the evil, an offer which appeared to us so reasonable, that we a little pressed upon the prosecutors to accept it. The prosecutors, however, who are

(a) *Antè*, Vol. 1. p. 317.

(b) 4 B. & Ad. 30; 1 N. & M. 690.

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surveyors of the highways, crave our judgment upon the point.

The work complained of as a nuisance, and undoubtedly making one, is the cutting through and obstructing the old carriage road. There is no question as to the right of the Company to do this; and although they are required, when they do it, to cause another road to be set out and made instead of it, as convenient as the former road, or as near thereto as may be, they argue that they are no longer indictable for a nuisance in doing a lawful act, however they may be liable for disobedience of the law in neglecting to substitute another road. The prosecutors reply by referring to the section (97), which requires the Company to cause that new road to be made before they cut through the old; the Company rejoin, that from the steepness of the land, and state of the earth there, it was impossible to do this, and that it could not be intended by the legislature to be done. This argument we think inadmissible, for reasons too obvious to require a full statement of them. The Company have done what the act legalises only upon a condition which they have not performed. They stand convicted of the nuisance, and shew no justification. The verdict, therefore, will not be disturbed, but we still hope that the parties will consent to an arrangement that may be useful to the public.

Rule discharged (a).

(a) In *Michaelmas* Term, 1843, judgment being prayed against the defendants, a fine of 5000*l.* was imposed upon Scott, and 20*l.* on each of the others; the nuisance complained of by the indictment to be abated; but it was ordered by the

Court, that no proceedings should be taken by the prosecutors to levy the fines, or to abate the nuisance, till the tenth day of the next *Easter* Term, in order to give the defendants an opportunity of doing so.

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COURT OF EXCHEQUER.

Sittings after Trinity Term, 1842.

PICKFORD and Another v. THE GRAND JUNCTION RAILWAY COMPANY. July 7.

THIS cause came on to be tried at the Sittings at Guildhall after Trinity Term, 1841, before Lord Abinger, C. B., and a special jury, when, by the direction of his Lordship, and by consent, a verdict was taken for the plaintiffs for 40s. subject to the opinion of the Court upon the following case, with liberty to turn it into a special verdict:—

The Grand Junction Railway was made in pursuance and under the authority of the following acts of Parliament, viz. 3 & 4 Will. 4, c. xxxiv, 4 Will. 4, c. lv, 5 Will. 4, c. viii, and 3 Vict. c. xlix, which are to be referred to as part

By the act 3 & 4 W. 4, c. xxxiv, the Grand Junction Railway Company are authorised (s. 156) "to carry and convey upon the railway, all such passengers, goods, &c., as shall be offered to them for that purpose, and to make such reasonable charges

for such carriage and conveyance as they may from time to time determine upon." Sect. 159 empowers them "from time to time to make such orders for fixing, and by such orders to fix the sums to be charged by them in respect of small parcels (not exceeding 500 lbs. weight each) as to them shall seem proper." By the 4 Will. 4, c. lv, s. 19, the Company are empowered to carry passengers, goods, &c., on other railways, "and to make such reasonable charges for such carriage &c. as they may determine."

The Company, under the powers of the above acts, became carriers of goods for hire between Manchester and London, using for that purpose their own and other railways. They published a list of charges, which divided the "rates by merchandize trains" into seven classes, from 16s. to 60s. per ton. Then followed "Boxes, bales, hampers, or other packages, when they contain parcels &c. under 112 lbs. weight each, directed, consigned, or intended for different persons, or for more than one person, 1d. per lb. weight."

The plaintiffs caused several small parcels, each under 112 lbs., intended for different persons, to be packed in a hamper, and tendered to the Company for carriage, offering at the same time to pay at the rate of 60s. per ton for the carriage. The Company refused to carry it on those terms, and demanded 1d. per lb.:—*Held*, that this charge was not a reasonable one.

By another act (3 Vict. c. xlix, s. 26) it was provided "that the charges by the recited act (3 & 4 W. 4, c. xxxiv) authorized to be made for the carriage of passengers, goods, &c., shall be at all times charged equally."

Amongst the charges in the above-mentioned list was one for "Manchester packs," 65s. per ton, with a notice at the foot of the list, that "goods were brought to the station at Camden Town without extra charge," and "no charge for booking or delivery in London." The Company made an agreement with C. & H., that the latter should carry from the station, and deliver in London all goods carried by the railway, and should for so doing receive 10s. out of every 65s. per ton:—*Held*, under the circumstances, that the charge of 65s. per ton to a consignee, who was willing to receive the goods at Camden Town, was both unreasonable and unequal.

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of this case. The London and Birmingham Railway was made in pursuance of and under the authority of the following acts of Parliament:—3 Will. 4, c. lv, and 6 Will. 4, c. lvi, which also may be referred to as part of this case.

On the 16th November, 1840, the defendants, in pursuance (as was alleged) of the said acts of Parliament, 3 & 4 Will. 4, c. xxxiv, 4 Will. 4, c. lv, 5 Will. 4, c. viii, and 3 Vict. c. xlix, determined upon and published a list of rates or charges for the conveyance of merchandize, whereof a copy is hereunto annexed, marked A. (a). The charges in this list are lower than had ever been before charged for the rapid conveyance of goods by land. Before and at the time of the publication of this list of charges, the defendants, availing themselves of the power given by the stats. 3 Will. 4, c. xxxiv, s. 156, and 4 Will. 4, c. lv, s. 19, were, and from thence have been, under the circumstances hereinafter mentioned, common carriers of goods for hire between Manchester and Birmingham, and between Manchester and London, that is to say, using for that purpose the Manchester and Liverpool Railway between Manchester and Newton, the Grand Junction Railway between Newton and Birmingham, and the London and Birmingham Railway between Birmingham and Camden Town, from whence the goods are conveyed to the places of consignment, as hereinafter mentioned, by carts and vans. The defendants satisfy the Manchester and Liverpool Railway Company, and the London and Birmingham Railway Company, for and in respect of the passage over their respective railways of the goods so carried by the defendants, and charge to the public, since the publication of the said list, the prices

(a) This list divided the "rates by merchandize trains" into seven classes of charges, the lowest being 16s., and the highest 60s. per ton. Then followed,—“Boxes, bales, hampers, or other packages, when

they contain parcels, or other packages or things under 112 lbs. weight each, directed, consigned, or intended for different persons, or for more than one person, 1d. per lb. weight.”

mentioned therein. The plaintiffs have for many years been, and still are common carriers of goods for hire between Manchester and Birmingham, and also between those places and London; and since October, 1840, have daily employed the defendants as such carriers as aforesaid, between the said places, to carry goods for them between those places, in parcels of above 112 lbs. weight each. They have also, since the same date, daily delivered to the defendants one or more parcels (as the case might be) under 112 lbs. each, and which in the trade are commonly known by the name of "smalls," to be carried between the same places, and for which latter parcels the plaintiffs have paid the defendants according to the rate fixed in the said published list under the title of "smalls." The plaintiffs charge to their customers various rates for the carriage of their goods, according to the quality, quantity and value of such goods. The revenue derivable from the carriage of small parcels has always been regarded and calculated upon by the defendants, and all other railway Companies, as formerly also by stage-coach and van proprietors, and all carriers by rapid conveyances, as a very large, important, and valuable item of profit; and a large and extensive establishment of clerks, horses, and vans is requisite for the express and special purpose of conducting such small-parcel business efficiently and conveniently.

On the 24th November, 1840, the plaintiffs had in their possession, as carriers between Manchester and Birmingham, several parcels of goods, consisting of teas, books, and hardware, which had been delivered to them by various persons to be carried to Manchester. On the same day, the plaintiffs caused the said several parcels to be packed in a hamper, the gross weight of which, and of the parcels contained in it, was 8 cwt. 3 qrs., although each parcel separately was less than 112 lbs. weight, and would (if delivered separately) have been a small parcel,

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and fallen under the title of "smalls," according to the list of prices before mentioned. On the same day, the plaintiffs caused the said hamper and its contents to be tendered to the defendants, as common carriers as aforesaid, at the place used by them at Birmingham for carrying on their said business of common carriers, and there required the defendants to carry the same and its contents from Birmingham to Manchester for them the plaintiffs; and the plaintiffs then offered to pay for such carriage the sum of 1*l*. 6*s*. 6*d*., being at the rate of 60*s*. per ton. The defendants' agent and manager at Birmingham, to whom the said hamper was tendered, was the duly authorized agent of the defendants for the management and carrying on of their said business at Birmingham, and he did not, at the time of such tender, know the contents or value or the nature of the contents of the said hamper, and so informed the person tendering the same, who, on being asked the contents, said they were "smalls," thereby meaning (as both parties understood) parcels, each under 112 lbs. weight, consigned or intended for different persons, and within the description sought to be charged for by the defendants in the said list of charges, either at 1*d*. per pound weight on the gross weight of the hamper and its contents, or at the usual small-parcel price for such parcels therein contained: whereupon the defendants' agent refused to receive or carry the said hamper and its contents according to the request of the plaintiffs, unless they allowed the hamper to be opened, so that the number of parcels contained therein might be known, and each parcel contained in the said hamper charged and paid for separately at the rate fixed in the said list, or unless they would pay the defendants for the carriage of the said hamper and its contents at the rate of 1*d*. per pound upon its weight of 8 cwt. 3 qrs., which would have amounted to 4*l*. 1*s*. 8*d*. The plaintiffs refused to pay for each parcel separately, or to pay 1*d*. per pound upon the gross weight of the hamper and its con-

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tents, and the defendants refused in consequence to carry the hamper. The said hamper was in a convenient form for the purpose of carriage, and was as capable of being conveyed by the defendants as any other parcel of the same weight, and no objection was made by the defendants to carry it upon any ground of inconvenience by reason of the weight or size of the hamper, or the nature of the contents, or upon any other than as aforesaid. The said hamper was duly directed to Pickford & Co., Manchester, where the plaintiffs have a place of business as common carriers under that name. The sum of 1*l.* 6*s.* 6*d.* which was tendered was the full amount the defendants were entitled to demand and receive for the receipt and carriage of the said hamper and its contents, and for all other charges, unless they were entitled to charge for each parcel contained in the hamper separately, or to charge 1*d.* per pound on the gross weight of the hamper and its contents.

On the 5th day of December, 1840, Pickford & Co., as such carriers as aforesaid, had in their possession at Manchester several parcels of cotton, linen and woollen goods, which had been delivered to them by various persons, to be carried by them to various persons at Birmingham. On the same day, the plaintiffs caused the said several parcels to be packed in a hamper, the gross weight of which, and the parcels so contained in it, was 6 cwt. 2 qrs. 10 lbs., although each parcel separately was less than 112 lbs. weight, and would (if delivered separately) have been a small parcel and fallen under the title of "smalls," according to the list of prices before mentioned. On the same day, the plaintiffs caused the said last-mentioned hamper and its contents as aforesaid to be tendered to the defendants, as common carriers as aforesaid, at the place used by them at Manchester for carrying on their said business of common carriers, and then required the defendants to carry the same and its contents to Birming-

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ham for them the plaintiffs; and the plaintiffs then offered to pay for such carriage the sum of 9s., being at the rate of 25s. per ton. The defendants' agent and manager at Manchester, to whom the said last-mentioned hamper was tendered, and who was duly authorised by the defendants as aforesaid at the time of such tender, did not know the contents, or the value, or nature of the contents of the said last-mentioned hamper, and so informed the person tendering the same as aforesaid: and the person tendering the same, on being asked the contents, said, "they are small parcels of cotton and linen, and woollen goods; thereby meaning (as both parties understood) parcels under 112 lbs. weight consigned or intended for different persons, and within the description sought to be charged for by the defendants in the said list of charges at 1d. per pound weight of the gross weight of the hamper and its contents, or at the usual small-parcel price for each parcel therein; whereupon the defendants' agent refused to receive or carry the said last-mentioned hamper and its contents according to the requisition of the plaintiffs, unless they allowed the said last-mentioned hamper to be opened, so that each parcel contained therein might be charged and paid for separately at the rate fixed in the said list, or the plaintiffs would pay the defendants for the carriage of the said last-mentioned hamper and its contents at the rate of 1d. per pound upon the gross weight of 6 cwt. 2 qrs. 10 lbs., which would have amounted to 3l. 1s. 6d. The plaintiffs refused to pay for each parcel separately, or pay 1d. per pound upon the gross weight of the hamper and its contents, and the defendants in consequence refused to carry the said last-mentioned hamper. The said last-mentioned hamper was in a convenient form for the purpose of carriage, and was as capable of being conveyed by the defendants as any other parcel of the same weight, and no objection was made by the defendants to carry it upon any ground of inconve-

nience by reason of the weight or size of the hamper, or of the nature of its contents, or upon any other ground than as aforesaid. The said last-mentioned hamper was duly directed to Pickford & Co., Birmingham, where the plaintiffs have a place of business as such common carriers, under that name. The sum of 9s., which was tendered, was the full amount the defendants were entitled to demand and receive for the receipt and carriage of the said last-mentioned hamper and its contents, and for all other charges, unless they were entitled to charge for each parcel contained in the hamper separately, or to charge 1*d.* per pound on the gross weight of the hamper and its contents.

Messrs. Chaplin & Horne, as well as the plaintiffs, have for many years been common carriers of goods for hire between London and divers other places of the country, and both of them have, for a long time, used the said London and Birmingham Railway, to a large extent, for the conveyance of goods intrusted to them respectively, as well from Camden Town to Manchester, as from Manchester to Camden Town. The London terminus of the goods department of the London and Birmingham Railway is at Camden Town, in the suburbs of London, and as well the plaintiffs as Messrs. Chaplin & Horne have, by arrangement with the London and Birmingham Railway Company, separate warehouses and places of business contiguous to each other, and within a few hundred yards of the said terminus, and together forming a part of the station or place of business of the London and Birmingham Railway, and respectively connected, by branch line of railway, with the main line thereof. On arrival at the aforesaid terminus of the London and Birmingham Railway, the London and Birmingham Railway Company forward the goods conveyed for the plaintiffs, or the defendants, or Chaplin & Horne, from Manchester or Birmingham, by horse power, along the several branch lines of railway running out of such main line, to as near the said warehouses of the plain-

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tiffs and Messrs. Chaplin & Horne respectively, as they conveniently can, and then leave the same for those parties respectively, under the charge and at the risk of those parties respectively, who afterwards receive the goods into their respective warehouses, and from thence send them by carts and vans to the various places to which they are directed or consigned.

The London and Birmingham Railway Company supply the trucks and locomotive power for the conveyance of the goods from Birmingham to Camden Town, and from Camden Town to Birmingham, and charge, as well to the plaintiffs as to the said Messrs. Chaplin & Horne, and all other parties using their railway for the conveyance of goods, a certain amount per ton for tonnage, varying according to the description of goods, and which, for the description of goods hereinafter mentioned, was, during the time hereinafter mentioned, 23*s.* 4*d.* per ton; and they also charge 12*s.* per ton for the use of their locomotive power, which includes the use of the trucks.

In the month of June, 1840, the defendants entered into an agreement with Messrs. Chaplin & Horne, a copy of which is left herewith, and either party is to be at liberty to refer to it (a). That agreement was acted upon between the parties thereto; and, in pursuance of it, goods collected at Manchester by the defendants, as common carriers from thence to London, are sent by them along the Manchester and Liverpool Railway, the Grand Junction Railway, and the London and Birmingham Railway, to Chaplin & Horne, at their said warehouses or places of business near the Camden Town terminus of the London and Birmingham Railway Company; and Messrs. Chaplin & Horne

(a) By this agreement, in effect, the Company stipulated to allow Messrs. Chaplin and Horne the sum of 10*s.* per ton out of the entire charge of 65*s.* per ton, for car-

rying the goods to and from the station at Camden Town, and delivering them at any place within the limits of the London Portage Act.

are debited by the London and Birmingham Railway Company for the rates due to them in respect of the carriage of the said goods upon their railway. Messrs. Chaplin & Horne then, by means of carts and vans, convey the said goods to the respective consignees thereof in London and its vicinity, making out in their own names, as principals to the consignees of such goods, the bills for the entire carriage thereof from Manchester, which they receive and account for to the defendants, first deducting for their own profit or remuneration the sum of 10s. per ton, as provided for in the agreement. On the other hand, in pursuance of the same agreement, Messrs. Chaplin & Horne, having collected in London, in their own name, and on their own responsibility, goods to be conveyed by them as common carriers to Manchester, bring the same to the said terminus at Camden Town, and then transmit them by the said London and Birmingham Railway as far as Birmingham, on trucks, with covers thereon, belonging to the defendants, and marked G. J. R. W. (being the initials of the defendants). At Birmingham they are taken charge of by the defendants, who remove them by a railway communication of their own from the terminus of the London and Birmingham Railway to their own terminus, and then forward them to Manchester by the Grand Junction Railway and the Manchester and Liverpool Railway, and the charge for the entire carriage from London to Manchester is received from the respective consignees by the defendants or their agents at Manchester.

In the month of January, 1841, the defendants determined on and published a new list of rates for the conveyance of goods, in alleged pursuance of the said acts of Parliament; of which list a copy is hereunto annexed, marked B. (a). Those rates, for example, the rate of 3s. 3d.

(a) By this list, the charge for the carriage of Manchester packs, from Manchester to London was stated to be 3s. 3d. per cwt., or 65s. per ton. At the foot of the list was the following:—"Goods

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per cwt., or 65s. per ton for the carriage of Manchester packs, being the description of goods hereinafter mentioned, include the conveyance of the goods from Manchester to the said terminus of the London and Birmingham Railway at Camden Town, and the conveyance of them thence along such branch line of railway towards or to the said warehouses or places of business of the said Messrs. Chaplin & Horne near to such terminus, and the further conveyance or delivery of the goods from thence by the said Messrs. Chaplin & Horne to or at the various places to which they are directed, if within the limits of delivery as fixed within the London Portage Acts, including the London Docks, which are five miles distant from the said terminus.

In like manner the plaintiffs and several other carriers have adopted the plan of charging one undivided sum only for carriage from Manchester and delivery at the places in London to which the goods are directed or consigned, without making any separate charge for portage or delivery. The expense for conveying goods from the said warehouses at Camden Town and delivering them within the limits aforesaid, amount to a sum varying from 5s. to 8s. per ton. The said charge of 3s. 8d. per cwt., or 65s. per ton, in the said last-mentioned list of rates, for the carriage of Manchester packs, is less than ever was before charged for the rapid conveyance of such kind of goods from Manchester to London or its suburbs, whether exclusive or inclusive of the charge for delivery. That charge, and none other, has from the time of the publication of the said last-mentioned list been always made by the said defendants, or Messrs. Chaplin & Horne, for the carriage of such goods from Manchester, whether the goods have been conveyed by vans or carts from the warehouses of Messrs. Chaplin

brought to the station at Camden Town, without extra charge. No charge for portage and delivery in London."

& Horne, and by them delivered to the consignees, at any place within the limits of the London Portage Acts, or whether (at the request of the consignees) the goods have been delivered to them at the said terminus at Camden Town; and the same course has been pursued by the defendants, or by Messrs. Chaplin & Horne, in regard to the charge for all the other description of goods specified in the said last-mentioned list of rates. The plaintiffs have always refused to pay such charge of 65s. per ton, as an unreasonable charge for the conveyance of such goods from Manchester to London, they being ready to receive the goods at the said terminus of the London and Birmingham Railway, and to carry away the goods from thence themselves. On the 16th day of February, 1841, the plaintiffs had in their possession, as carriers, a Manchester pack, (being a package of cotton and woollen goods), weighing 7 cwt. 2 qrs. 17 lbs., which had been delivered to them to be conveyed to London; and on the same day they caused the said pack to be tendered to the said defendants, as common carriers as aforesaid, at their place of business at Manchester, and required them to receive and convey the said pack of goods for them from Manchester, according to the terms of the following letter :—

“London, 16th February, 1841.

“Gentlemen,—Our agent, Mr. Robert Moseley, has our instructions to tender to you the goods sent herewith and specified below, for conveyance by you as common carriers. They are intended for our London house, and are to be delivered to them at our place of business at the terminus in Camden Town. Mr. Robert Moseley has instructions to offer you, at the same time, the highest price for the carriage thereof which you are in the habit of charging to all persons for the carriage of similar goods, deducting therefrom the allowance which you are in the habit of making under similar circumstances to Messrs. Horne & Chaplin, or to any other persons. Believing that,

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65s. per ton is the sum charged by you for similar goods when delivered to the consignee within the city of London or elsewhere, and 10s. to be the allowance made thereout to Messrs. Horne & Chaplin, or to other persons, when the same are delivered at the terminus in Camden Town, we have instructed Mr. Robert Moseley to offer you the sum of 55s. per ton for the carriage of the goods sent herewith. Our intention, however, is to offer you precisely the same sum which you receive from Messrs. Horne & Chaplin, or from other persons, for the conveyance of the same weight of similar goods under the same circumstances; and if we are under any misapprehension as to the amount, we request your correction in this respect, to which Mr. Robert Moseley has our instructions to attend, and will pay the right amount according to the same. And in order to prevent any possibility of misconstruction, we beg to say, that we are willing to consign these goods as Messrs. Horne & Chaplin, or other persons consign theirs, and to deal with the same in all respects as Messrs. Horne & Chaplin, or other persons deal with theirs, when the same are intended to be delivered at the terminus in Camden Town; and to afford you, as carriers over the lines of railway between this place and Camden Town, every facility or advantage which Messrs. Horne & Chaplin, or other persons, afford you in that behalf; and, in short, we are willing, and we hereby require to be placed from time to time, and in all respects under similar circumstances with them, and that you should carry our goods at the same reasonable charge as you carry theirs.

We are, Gentlemen,

Your obedient servants,

(Signed) PICKFORD & Co."

"To the Grand Junction Railway Co.,
 Manchester,
 Per ROBERT MOSELEY."

The plaintiffs were then, and also at the time of the commencement of the present suit, ignorant of the precise terms of the said agreement between the defendants and Messrs. Chaplin & Horne, but they were aware that some kind of agreement had been entered into between those parties.

The plaintiffs were then ready and willing to pay, and tendered to the defendants payment for the carriage of the said pack, upon the terms mentioned in the said letter.

The defendants replied to the said letter and the requisitions therein made, that 65*s.* per ton was their charge to all persons for such goods as were then tendered to them for carriage, and that upon payment of such charge they would receive the said pack, and carry and deliver it at Camden Town, or any other place in London to which it was directed or consigned, but that they would not carry it at any lower charge.

The plaintiffs refused to pay at the rate of 65*s.* per ton, and the defendants in consequence refused to carry the pack.

The Court is to be at liberty to draw from the above facts any conclusion which, in their judgment, a jury ought to have drawn.

The questions for the opinion of the Court are—

1st. Whether the defendants were by law bound to carry the hamper and its contents first above mentioned from Birmingham to Manchester at the rate, or for the sum of 1*l.* 6*s.* 6*d.*

2ndly. Whether the defendants were by law bound to carry the hamper and its contents secondly above mentioned from Manchester to Birmingham at the rate or for the sum of 9*s.*

3rdly. Whether the defendants were entitled by law to charge at the rate of 65*s.* per ton for the carriage of the pack of goods thirdly above mentioned from Manchester to Camden Town.

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The verdict on the several issues is to be entered in such manner and form as to the Court shall seem proper, it being agreed, that, in the event of the plaintiffs' being held entitled to the judgment of the Court on any of the counts of the declaration, then the damages are to be entered and assessed at the sum of 40s.

Martin, for the plaintiffs (a).—In the course of the case it will be seen, that, if the defendants are entitled to judgment, the result will be to give them the monopoly of the entire land carriage of goods between London and Lancashire.

The law with respect to Companies of this kind, who have obtained privileges from the legislature, is perfectly well understood, and has been more than once the subject of judgment by the judicial authorities of the Courts. In *Blakemore v. The Glamorganshire Canal Navigation* (b), Lord *Eldon*, C., says, "When I look upon these acts of Parliament, I regard them all in the light of contracts made by the legislature on behalf of every person interested in any thing to be done under them; and I have no hesitation in asserting, that unless that principle is applied in construing statutes of this description, they become instruments of greater oppression than any thing in the whole system of administration under our constitution. Such acts of Parliament have now become extremely numerous, and from their number and operation they so much affect individuals, that I apprehend, those who come for them to Parliament do in effect undertake that they shall do and submit to whatever the legislature empowers, and compels them to do, and that they shall do nothing else, and that they shall do and forbear all that they are thereby required to do and forbear, as well with reference

(a) July 2nd, before *Parke*, *Alderson*, and *Gurney*, B.

(b) 1 Myl. & K. 162.

to the interests of the public as of individuals;" and, *Alderson, B.*, on a review of all the cases in *Lee v. Milner* (a), seems to decide upon the same ground. "The stipulations contained in acts of this sort are in the nature of conditions, and the legislature confers those privileges on such Companies on the condition that they shall obey the different enactments contained in the different acts with reference to them."

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The ground upon which these Railway Companies obtain such powers from the legislature is giving increased speed and cheapness in the conveyance of goods and passengers throughout the country, and the result has been that they have obtained the sole and exclusive carriage of both on every line of road on which they have been established. It is evident that by this act a vast number of authorities and powers are given to the Company which they could not have had without the intervention of the legislature; such as the taking land, making charges, and compelling payment of rates. But, it was clearly not the intention of the act, probably not of the parties themselves, to confer an exclusive right; although, in consequence of the dangerous nature of the locomotive power, the practical consequence has been, that the regulation of such engines requires to be under the sole control and superintendence of one body, and thereby they have obtained a complete monopoly, not only of the railway itself, but of the traffic upon it.

But it is clear from the act 3 & 4 Will. 4, c. xxxiv, that such was not the intention of the legislature. Section 154 is founded upon the idea, that persons were to use their own carriages and locomotive power upon the railway, and gives the Company a tonnage for the use of the line of road, according to the length over which the goods pass, of 1*d.* per ton per mile. That principle per-

(a) 2 Y. & C. 618.

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vades all the sections which follow. Sect. 155 is with respect to tolls on carriages conveying passengers or cattle, in proportion to the quantity passed over; and sect. 156, in addition to the tonnages and tolls before imposed, allows them to make a *reasonable charge* for the carriage and conveyance of goods, &c. Sect. 158 gives great powers. It authorizes the Company to provide locomotive engines, and to receive such sums of money, for the use of such engines, as they shall think proper, in addition to the other rates, tolls or sums authorized to be taken. Then sect. 159 empowers them, from time to time, to make such orders for fixing, and to fix the sums to be charged in respect of small parcels not exceeding 500 lbs. weight, as they shall think proper.

The first point submitted here is, that the two first cases stated in the special case do not come within the description of *small parcels* under sect. 159. That section is strictly confined to parcels under 500 lbs. weight. It is obvious that there are a great variety of parcels in this country of which the value is exceedingly great, and the weight extremely small; such as bankers' or solicitors' parcels, plate, jewellery, &c.; and that to confine carriers to charge by weight for a parcel of that kind, of merely a few poundsweight, would give them no fair remuneration for their services. This clause was inserted for the benefit of the Company with regard to such parcels. Therefore, where a parcel above 500 lbs. weight is delivered to them, which would afford them a remuneration from its *weight*, it does not fall within this section. These charges have been framed upon tests, not of *value*, but of compensation for the trouble and labour caused in the carriage of the article itself; and, practically, the question of value is of no consequence, for the Company, or any other carriers, are completely protected by the Carriers' Act (11 Geo. 4 & 1 Will. 4, c. 65) from any risk that might be supposed to be cast upon them in case of loss of articles of large value.

The question, therefore, turns on sect. 156, authorizing such reasonable charges as shall from time to time be determined upon. Then, what is a *reasonable charge*? Suppose two packages of cotton goods, made up in the most convenient way for the purpose of carriage, one containing seven or eight *separate parcels*, each far under 112 lbs. weight, and another, of precisely the same weight, containing goods of precisely the same description undivided. They are both to be delivered in Manchester; but when the person to whom they are directed receives them, he is to open one and take the trouble of sending the different parcels contained in it to *several* different individuals at Manchester; there is not the slightest additional labour, trouble, or expense to the Company, they are literally one and the same identical package. Can it be *reasonable* that for one of these they should be allowed to charge 3*l.* 1*s.* 6*d.*, and 9*s.* for the other? According to list A., "Bales, packs, and cases of cotton, linen, and woollen goods," are divided into seven classes, from 25*s.* to 60*s.* a ton. That may be reasonable; but then comes, "For boxes, bales, hampers, or other packages, when they contain parcels under 112 lbs. weight each, intended for different persons, 1*d.* per lb. weight." That is manifestly unreasonable, and in principle confers a monopoly in small parcels, found in the case to be a source of great revenue, which never could have been intended by the legislature.

The judgment on the second case must of necessity follow the first.

The other question arises on the third case, and, important as the first was, this is infinitely more so, involving the entire land carrying trade from Lancashire to London. If the defendants are entitled to judgment upon it, they will acquire a complete monopoly of the whole trade, and by the simplest possible means, namely, by making one charge for the carriage and delivery of goods to a consignee. They say they will deliver goods at any place within

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the limits of the London Porterage Act, which includes the whole of the docks, and will charge 65*s.* per ton. Now, as the plaintiffs are *practically* obliged to bring their goods by the railway, if they are compelled to pay 65*s.* per ton at Camden-town, they will lose the whole of their trade, and can get no profit; for customers, rather than deal with them on dearer terms, will deal with the Company. A man will not pay four or five shillings more to them than to the Company; so that, if they do business at all, it must be without the smallest profit, which of course would lead to the total destruction of their business, and to a complete monopoly in the Company. They ought to make a distinction between charges for carriage on the railway and for delivery afterwards, and both should be reasonable; but this charge is clearly illegal and unreasonable. By their first act (3 Will. 4, c. xxxiv, s. 156), this Company were limited to carrying goods between Manchester and Birmingham; but a clause was inserted in a subsequent act, (4 Will. 4, c. lv), which enabled them to become carriers on other railways: sect. 19 recites sect. 156 of the former act, and then gives the additional powers to carry and convey upon any other railways, and to make such reasonable charges for such carriage or conveyance (not exceeding the amount specified in the said recited act) as they may determine. That, obviously, strictly confines them to a charge for the carriage of goods along the line, and they have no right to club the charge for conveyance on the railway, with that to the place of delivery in London, which is found in the case to vary from 5*s.* to 8*s.* per ton, or nearly one-ninth of the entire charge.

Again, by the 3 Vict. c. xlix, s. 26, it is enacted, that the charges by the said recited act (3 Will. 4, c. xxxiv) authorized to be made for the carriage of any passengers, goods, &c., to be conveyed by the said Company, or for the use of any steam-power or carriage to be supplied by the

said Company, shall be at all times charged *equally*; and no reduction or advance in any charge for conveyance by the said Company, or for the use of any locomotive power to be supplied by them, shall be made, either directly or indirectly, in favour of or against any particular Company, or person travelling upon or using the same portion of the said railway, under the same circumstances. The Company receive 55*s.* per ton for the carriage of goods on the railway to Camden-town, where Messrs. Chaplin & Horne, by their agreement with them, undertake the whole agency and responsibility of delivering in any part of London for 10*s.* per ton more. Chaplin & Horne are in precisely the same situation as the plaintiffs: they go to the station, receive the goods, for which they pay 55*s.* per ton, and then have 10*s.* per ton for what they have to do with the delivery. The plaintiffs, also being carriers, go to the Company, having saved them the trouble of collecting the goods in Lancashire, and offer to pay the same sum for carriage to Camden-town as Chaplin & Horne. The Company refuse this offer, and charge them the extra 10*s.* for carrying to Camden-town; consequently, refusing them the same advantages as are allowed to the other firm. It is clear, therefore, that the one charge for conveyance of goods and delivery in London, and the refusal to deal with all parties on the same footing as with Chaplin & Horne, is unreasonable and unequal, and that the plaintiffs, on all the grounds, are entitled to judgment.

Cooling, contra.—The public are more concerned in this question than the carriers. It is admitted that these Railway Companies have caused very great rapidity and cheapness of conveyance; and the question comes to this, whether those advantages which the public have received are to continue. These classes of prices are established by the Companies only for their own protection, and if they are not entitled to that protection, the other rates must be

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increased, and the public *pro tanto* injured. It is not the object nor the tendency of the proceedings to obtain a monopoly, and if it be caused, it will only be from this,—that this Company are enabled to carry for the public at a much cheaper rate than the plaintiffs. If so, of course the business will be given to those persons who can do it in the best and cheapest manner; and it is found in the case that these rates are lower than those before adopted.

First, with relation to the question of *small* parcels, the Company charge 2s. 6d. for the carriage of a parcel of 112 lbs. weight from London to Manchester. If they have no power to put a clog of this sort, the consequence may be, that a carrier may undertake to carry such parcels *by the railway* at a much cheaper rate, say for 1s., and he may easily do it in this way. The great majority of parcels are much under 112 lbs. He would receive all that came to him, put twenty together, and the twenty might only amount to 112 lbs. He would pay the Company 2s. 6d. for the carriage of these goods, he would himself receive 20s. and pocket the difference, although, during all that time, he will be at no trouble whatever. The Company would be at the whole expense, trouble and risk, yet they would in that way be defrauded of what they reasonably ought to have, and the carrier would have the benefit. That mode of dealing would not be fair, and therefore unless this clause gives the protection contended for, the question would come to this, whether these carriers, who were themselves a short time ago the greatest monopolists in the kingdom, are to continue that monopoly at the expense of the railway. Suppose the Railway Acts were out of the question, and that this were an action by a third person against Messrs. Pickford themselves, and the question was whether the scale of prices marked A. would be reasonable if they themselves had established it. It is contended that it would be *reasonable*; at all events it lies

on the plaintiffs to shew it to be unreasonable, and unless they can make that out, their claim must fail.

The general rule with respect to prices of carriers is laid down in ——— v. *Jackson* (a), where Lord *Kenyon*, C. J., says, "There are acts of Parliament which authorize justices of the peace to fix the rates to be taken by carriers, and I have known instances of application to the sessions for the purpose; but when no right is by law fixed, the carrier is entitled to say *on what terms* he will carry. He is not obliged to take every thing which is brought to his warehouse, unless the terms on which he chooses to undertake the risk are complied with by the person who employs him. That is the general rule." Again, in *Wyld v. Pickford* (b), *Parke*, B., says, "We agree that if the notice furnishes a defence, it must be either on the ground of fraud, or of a limitation of liability by contract; which limitation it is competent for a carrier to make, because being entitled at common law to insist on the full price of carriage being paid beforehand, he may, if such price be not paid, refuse to carry upon the terms imposed by the common law, and insist upon his own; and if the proprietor of the goods still chooses that they shall be carried, it must be on those terms." The defendants therefore, as common carriers, may insist on their own prices, unless they can be shewn to be unreasonable. It is not enough to shew that one price may itself be large; if the prices *generally* for the carriage of goods be unreasonable, the Court will not enter into the question whether the price in *one* particular instance is more than it ought to be. In the common case of an innkeeper, or the like, almost every tradesman would have some charge greater than others, though altogether the price may be the same. In an action on a tailor's bill it is common for a witness to say he

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(a) 2 Peake's N. P. C. 185.

(b) 8 M. & W. 458.

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should perhaps charge less for *this*, but, taking the whole, he thinks the prices are reasonable.

But, suppose the Court would inquire whether under some peculiar circumstances one particular charge might be reduced or not. It is quite clear that a carrier is to be paid a reasonable remuneration for what he does; that depends not merely on the labour he undergoes, but also on the risk incurred during the same time. How is that risk to be ascertained, unless the carrier is aware what are the goods he carries? They may be more or less valuable, and of course a greater or less degree of risk and responsibility incurred. He ought to have some way of ascertaining what is the proper remuneration. He cannot compel the parties to unpack their parcel. Is he to take their word as to the quality of the goods? That would be no sufficient protection. He has then no other course but this. The ordinary general practice between carriers and their customers is, that each customer sends his own goods, and the liability which carriers incur was first established by law with reference to that course, not with a view of people clubbing their goods together and sending them in that way. [*Alderson, B.*—Who is the *contracting party*? What have you to do with a sub-contract which I may make?] Then a Railway Company may be converted into the servants of other carriers, which the law has never established yet. The common case is that carriers must carry the goods of their customers; but if they find that those goods really belong to other people, they may refuse to carry them, except upon reasonable terms. In *Riley v. Horne (a)*, this question of liability was a good deal discussed, and *Tindal, C. J.*, says, “ We have established these points, that a carrier is an insurer of the goods which he carries; that he is obliged for a *reasonable* reward to carry

(a) 5 Bing. 217; 2 M. & P. 331.

any goods to the place to which he professes to carry goods that are offered him, if his carriage will hold them, and he is informed of their quality and value; that he is not obliged to take a package, the owner of which will not inform him what are the contents, and of what value they are; that if he does not ask for this information, or if when he asks and is not answered he takes the goods, he is answerable for their amount." [*Parke, B.*—That does not apply here, because he was told what they were, and the answer does not appear to be an untrue one.] That language is explained in another part of the judgment. His Lordship continues (p. 222): "A carrier has a right to know the value and quality of what he is obliged to carry. If the owner of the goods will not tell him what his goods are, and what they are worth, the carrier may refuse to take charge of them; but if he does take charge of them, he waives his right to know their contents and value." It is plain from that authority a carrier has a right to know what the goods are. When he does not know that, but knows that they really belong to other persons, that is, when he finds customers acting contrary to the ordinary course and putting together the goods of several persons, for which they will charge several prices, he is entitled to charge as much as he thinks reasonable, that is, to charge upon the same scale as the customers charge to the consignees. [*Parke, B.*—This Company do not refuse to carry because they do not know what the contents of the parcels are. *Alderson, B.*—The ground of refusal is the reverse; it is because they *do know* the contents.] They refuse because they do not know who the consignees are. [*Alderson, B.*—They would be no wiser upon that point if the contents of the parcels were spread out before them.] If they knew that, it would not be unreasonable to charge the same price to the customers that they receive from the consignees.—Besides, the risk

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is much increased : *Kenrig v. Eggleston* (a). Where goods belonging to different persons are lost, each person would have an action against the Company. [*Parke, B.*—How do these persons *contract* with the Company?] If the Company can be compelled to act as carriers for others, and an accident happen to the goods, if an action were brought by the owners, it would be said that Pickford & Co. were merely acting as agents for the owners, and each owner would have a right to the damage which his goods sustained. That in time would come to a notorious practice, and a jury would always say that when Pickford brought the goods the Company well knew they were acting for other persons, and therefore contracted as many liabilities as there were owners. If a hamper full of these small parcels was delivered to a wrong person, each consignee might bring an action : for that would be a case of misfeasance, for which trover would be maintainable by each owner : *Owen v. Burnett* (b). The argument on the other side is on the assumption that if two packages are sent of the same size and weight, with the same convenience for carrying them, the carrier must charge the same price. The sum which he charges depends much more on the responsibility he incurs, than on his mere labour. Suppose a carrier says he will not take charge of a parcel unless he is paid for booking, to which he is entitled according to ——— *v. Jackson* (c), a person might refuse to pay that extra price ; but if an action were brought, and the question turned upon *reasonable* charge, it is clear no such reasonable charge would be held to have been tendered. This charge is no more unreasonable than the charge for booking, or the obligation on the public to conform to the carriers' notices. As to the act of Parliament, it has been suggested that sect. 159 is confined to the case of *tonnage*

(a) *Aleyn*, 93. (b) 2 C. & M. 353. (c) 2 *Peake's N. P. C.* 185.

rates, but the Company contend that it is to be applied to all former cases, including those within sect. 156, so that they are enabled by virtue of it to make such rates as they think proper for all parcels not exceeding 500 lbs, and that if that clause is to be evaded by carriers putting together several small parcels, the property of different persons, so as to increase the weight of the whole parcel to more than 500 lbs., that clause of the act is perfectly nugatory.

Secondly, the Company have a right to say, "we charge for our conveyance to London so much, and for that we will also *deliver* the goods." The charge for delivering, in point of fact, is not a separate charge, they charge for *conveyance*, delivery being a portion of it, but they object to any deduction being made from that charge. [*Parke*, B.—That is not a reasonable charge, it must be unreasonable to charge the same for carrying and delivering, as for carrying only. *Alderson*, B.—When they are bound to charge all people *equally*, it cannot be equal to charge the plaintiffs 65*s.* for that for which they charge other people 55*s.*]

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Martin, in reply.—The point now to be contended seems not so much to make out that 9*s.* was reasonable in the first and second case, as that the other was not the legal charge, and the *onus* which was supposed to lie on the plaintiffs does not exist. In the rates themselves nothing is said about charging separately for each parcel contained in a lot. There is one provision only, that 1*d.* per lb. shall be charged when a hamper contains a number of packages amounting to 112 lbs. weight. The least calculation will shew that, taking any number of small parcels, 1*d.* per lb. will be three or four times the amount of the price of them separately. So that this mode of putting them up is obviously a *penalty* imposed on the persons who put them together. As to the question of danger, practically it does not arise; but if it does, it is one of the things carriers must put up with. It has nothing to do with

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the liabilities at common law ; and, if it had, the right of action would be against the plaintiffs, as the contractors, in every case except of positive misfeasance. The question is whether the particular case comes fairly within the act of Parliament. If so, this Company, having procured the act, and having obtained the privileges given by it, and acting under those privileges, must also take the burthen imposed by it.

Cur. adv. vult.

PARKER, B., now delivered the judgment of the Court.—The two main questions raised in this case are, 1st, whether the defendants were bound to carry a hamper containing several parcels, each less than 112 lbs., directed to and intended for different persons, for the sum offered to them by the plaintiffs ; and 2ndly, whether they were bound to carry a parcel from Manchester to Camden Town for the sum offered to them by the plaintiffs. There were two hampers, each containing several such small parcels, tendered at different times to the defendants ; but the same question arises out of both. The sum tendered in respect of each is proved to have been the full amount the defendants were entitled to receive for the receipt and carriage of the hamper and its contents, and for all other charges, unless they were entitled to charge for each parcel contained in the hamper separately, or to charge 1d. per lb. on the gross weight of the hamper and its contents. We are to determine, therefore, whether the defendants are entitled to make either charge,—a mixed question of law and fact ; the fact being submitted to us, by consent of the parties, as to a jury.

Under the act of Parliament establishing the Grand Junction Railway Company, 3 Will. 4, c. xxxiv, the Company are authorized, by sect. 156, to carry upon that railway all such goods &c. as shall be offered, and to make such *reasonable* charges for such carriage and conveyance as

they may from time to time determine upon, in addition to tonnage and tolls, without any other restriction in the case of goods than *that the charges should be reasonable*. By 4 Will. 4, c. lv, s. 19, these powers are extended to the carriage of all goods that shall be offered on other railways, but they are still to make *reasonable charges for such carriage*.

By virtue of these clauses, the Company, in their character of common carriers, are bound to carry for *reasonable* charges, if reasonable charges are tendered to them. The first question then is resolved into this, whether for the two hampers, containing small parcels consigned to different persons, it is reasonable to charge either for each parcel contained in the hamper separately, or 1*d.* per lb. on the gross weight of each hamper and its contents.

The charge is, no doubt, to be varied according to the trouble, expense and responsibility attending the receipt, carriage and delivery of different articles; and for small parcels more ought to be paid than a proportionate part, according to weight, of the price of larger parcels of the same commodity, by reason of the greater trouble in receiving, dispatching and delivering them, and their exposure to a much greater risk of abstraction or loss. But if all the small parcels are united in one large package, and delivered to the carrier in that package, consigned to one person, the trouble and responsibility are apparently reduced precisely in the same degree as if all the articles contained in that package were the property of the same owner, and intended to be delivered to him. There would seem, therefore, to be no right to charge for such package of distinct parcels, belonging to different owners, more than if they belonged to the same. But then it is argued on the part of the defendants, that there really is an increased responsibility, arising from the simple fact that each parcel is the property of a distinct owner, because it is

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said that, in the event of a misdelivery, the Company would be liable to several actions of trover instead of one, and, even in case of loss or damage by neglect, each separate owner might maintain an action by the custom of England in respect of his own goods. It is very doubtful at least whether, on the custom of England, separate actions could be maintained, as the relation of employer and carrier could not have subsisted between them and the Company, but between them and the plaintiffs. As actions of trover, however, could be maintained, it would not be unreasonable to allow some additional remuneration on account of the liability, not to pay greater damages, for they would be the same in both cases, but to pay the same damages by means of different suits. We are relieved, however, from the necessity of deciding what the precise amount of additional compensation (which, at all events, would be trifling) on this account should be, because it is admitted on the special case that the sum tendered is proper, unless the defendants had a right to charge for separate parcels, which they certainly had not, because neither the trouble, expense, nor responsibility was the same as if the parcels had been separate; or unless the defendants had a right to charge 1*d.* a lb. on the whole. We have no difficulty in saying that this last-mentioned remuneration is excessive, and unjustified by the increase of responsibility from the circumstance of the properties being separate. It is impossible to support on this ground a charge of 4*l.* 1*s.* 8*d.* for the first package, for which, if it had consisted of parcels, one property, 1*l.* 6*s.* 6*d.* would have been the proper charge; and a charge of 3*l.* 1*s.* 6*d.* instead of 9*s.* for the second.

We are of opinion, therefore, that the plaintiffs are entitled to our judgment on the first question raised between the parties, which is the subject of the two first counts.

As to the second question, the Court have already intimated their opinion that the Company cannot support a claim for the same sum for carriage to Camden Town, and for carriage thither and delivery at any place in London. By the provision already referred to, they are to carry for reasonable charges for carriage, and by 3 Vict. c. xlix, s. 26, such charges are to be made equally; and it is clearly unreasonable and unequal to charge the same sum to a consignee who is willing to receive the goods at Camden Town, and one who requires them to be delivered at the London Docks, or elsewhere in London. The plaintiffs are bound to pay the balance of the 65*s.* per ton, after deducting the reasonable charge for delivering in London, and no more, and the defendants must carry to, and deliver at Camden Town for that sum.

The plaintiffs are therefore entitled to succeed upon the second question raised by this special case.

The verdict on all the issues is to be entered for the plaintiffs.

Judgment for the plaintiffs.

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July 7.

TURNER v. THE SHEFFIELD AND ROTHERHAM RAILWAY COMPANY.

By a Railway Act (6 & 7 W. 4, c. cix) It is provided (sect. 20) "that nothing in this act contained shall authorize the Company to take, injure, or damage for the purposes of this act any house or building which was erected on or before the 30th of November, 1835, without the consent in writing of the owner or other person interested therein, other than such

as are specified in the schedule to the act annexed, unless the omission proceeded from mistake."

Sect. 35 provides for the settling of differences between the Company and the owners and occupiers of any lands taken, used, damaged, or injuriously affected by the execution of the powers granted by the act, and for the payment of satisfaction both for damages sustained, and for future temporary or recurring damages.

The Company, in the execution of the powers of their act, had erected a railway station and embankment near a house used as a starch manufactory, and had thereby obstructed its lights and caused damage to it by the dust and dirt drifted from the station &c. The house was erected before the 30th November, 1835, had not been specified in the schedule, nor omitted therefrom by mistake, and no consent in writing to the construction of the station or embankment had been obtained from the owner or any other person interested in the house.

Held, that the Company, were liable in an action on the case at the suit of the reversioner for such damage, and that the plaintiff was not confined to the remedy provided by the act for compensation.

Quere, whether in cases where the consequential damage to such house &c. could not have been foreseen, as by stopping springs communicating therewith, such inconvenience will not afford a ground for limiting the general expression, and exempting the Company from liability to an action.

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aforesaid there of right had been and were, and still of right ought to be divers, to wit, one hundred ancient windows, through which the light and air, during all the time aforesaid, ought to have entered, and still of right ought to enter into the said messuages, &c., for the convenient and wholesome use, occupation, and enjoyment thereof; yet the defendants, well knowing the premises, but contriving, &c., to injure, prejudice, and aggrieve the plaintiffs in their reversionary estate and interest of and in the said messuages, &c., while the said messuages, &c. were so in the possession and occupation of &c., as tenants thereof to the plaintiffs, and while the plaintiffs were so interested therein as aforesaid, to wit, on &c., and on divers other days and times, &c., wrongfully and unjustly, without the leave or license and against the will of the plaintiffs, erected and built a certain railway station, wall and embankment in and upon the said land in the possession of the defendants as aforesaid, and near to the said messuages, &c., and wrongfully and injuriously kept and continued the said railway station, wall and embankment for a long time, to wit, &c., by means of which said several premises the light and air, during all the time aforesaid, were and still are hindered and prevented from coming and entering into and through the said windows, or any of them, into the said messuages, &c., and the same have thereby been rendered and are dark, close, uncomfortable and unwholesome, and less fit and commodious for the purpose of manufacturing starch therein, and for the other purposes for which the same had been heretofore used; and also, by means of the premises, divers large quantities of earth, soil, dust and dirt were, during all the time aforesaid, and continue to be carried, drifted, blown, scattered and spread from and off the said railway station, wall and embankment, so erected by the defendants as aforesaid, against, into and through the said windows, and into the said messuages, &c., and into and amongst the fixtures, imple-

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ments and effects therein ; and thereby the said messuages, &c., fixtures, implements and effects became and were rendered dirty, foul and clogged up, so that the same became and were less fit and commodious for the said purpose of manufacturing starch therein and therewith, and for the other purposes to which the same had been heretofore used, by means of which said several premises, the said messuages, &c. became and were greatly deteriorated in value, and the plaintiffs have been and are greatly damaged, &c., in their reversionary estate, &c.

Pleas, 1st, not guilty ; 2ndly, as to so much of the declaration as relates to the alleged hindrance and prevention, by the means therein mentioned, of the light and air coming and entering into and through the said windows, &c., and as to the supposed causes of action in respect thereof, that they the defendants, before and at the time of the committing of the said alleged grievances were and still are the body corporate mentioned in a certain act of Parliament, (7 Will. 4), intituled, &c.; and also in a certain other act of Parliament, (3 Vict.), intituled, &c. And the defendants further say that the said land so in the possession of the defendants, as in the declaration mentioned, was, before and at the time of the committing of the said alleged grievances to which this plea is pleaded, and still is, land purchased by the defendants after the passing of the said first-mentioned act of Parliament, in pursuance of the powers and provisions therein contained, for the purpose of making and providing a certain station, warehouses, and other buildings and conveniences, for receiving, depositing, loading, and keeping goods, matters and things, conveyed and intended to be conveyed upon the said railway, in the said act mentioned, and for other purposes connected with the undertaking thereby authorized. And the defendants further say, that the said railway station, wall and embankment in the declaration mentioned, and so kept and continued by the defendants, as therein men-

tioned, in the bonâ fide execution of the powers by the said first-mentioned act granted, and for the purposes and according to the provisions and restrictions of the same act, the said railway station, wall, and embankment having been respectively adjudged requisite, and having been constructed and made by the defendants under the powers and provisions of the said act, for the purpose of providing a certain station and yard, buildings and conveniences for the purpose of the said undertaking, to wit, at Rotherham aforesaid, at the termination of the said railway there, they, the defendants, then doing as little damage as might be in that behalf.—Verification. 3rdly, (Similar plea to the residue of the declaration).

Replication to the 2nd and 3rd pleas, that the said messuages, &c., in the declaration mentioned, are houses and buildings which were erected before the 30th day of November, 1835, to wit, on &c., and that the said several grievances in the plea mentioned were committed by the defendants, and the said messuages, &c. were thereby so injured and damaged as in the declaration alleged, without the consent in writing of the plaintiffs, so being owners of the said several messuages, &c. as in the declaration mentioned, and without the consent in writing of any other person interested in the said messuages, &c.; and that the said messuages, &c. were not nor are, nor were nor are any of them, or any part thereof, specified in the schedule annexed to the said act of Parliament (6 & 7 Will. 4), and that the omission of the said messuages, &c., from the said schedule did not proceed from mistake.—Verification.

General demurrers, and joinders in demurrer.

The following point was marked for argument on the part of the defendants:—That the railway station, wall and embankment in the declaration mentioned having been (as is admitted upon the pleadings) erected in the bonâ fide execution of the powers of the defendants' act of Parliament, the defendants are protected by such act, and

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particularly by the 5th section thereof, from being sued at law in respect of such erection; and further, that the 20th section of the said act does not extend or apply to injury or damage of the description and character of that alleged in the declaration (a).

(a) The material sections of the act (6 & 7 Will. 4, c. cix) are as follow:—

Sect. 5 gives power to the Company to make the railway and other works upon, across, under, or over the lands, &c. delineated in the map, and described in the book of reference to the act annexed, doing no unnecessary damage, and making satisfaction to the owners and persons interested in the lands, &c.

Sect. 19 provides for rectifying unintentional errors in the book of reference.

Sect. 20. "Provided also, that nothing herein contained shall authorize the said Company to take, injure, or damage, for the purposes of this act, any house or building, which was erected on or before the 30th day of November, 1835, or any land then set apart and used as and used for a garden, orchard, yard, park, paddock, plantation, planted walk, or avenue to a house, or any inclosed ground planted as an ornament or shelter to a dwelling-house, or planted and set apart as a nursery for trees, without the consent in writing of the owner thereof, or other person interested therein respectively, other than and except such as are specified in the schedule to this act annexed, unless the omission thereof from such schedule shall have proceeded from mistake, and the fact that such

omission proceeded from mistake shall have been certified in manner hereinbefore provided for, in case of unintentional errors in the said book of reference."

Sect. 35. "For settling all differences which may arise between the said Company and the several owners and occupiers of, or persons interested in, any lands, which shall or may be taken, used, damaged, or injuriously affected by the execution of any of the powers hereby granted;" enacts, "That, if any person, corporation, or trustee so interested or entitled and capacitated to sell, agree, convey, or release as aforesaid, or any other person, shall not agree with the said Company as to the amount of such purchase-money or other compensation as aforesaid, or if any of the parties entitled to receive such purchase-money, satisfaction, or other compensation as aforesaid, shall refuse to accept such purchase-money, &c. as aforesaid, as shall be offered by the said Company, and shall give notice thereof," &c., a jury is to be summoned in the manner therein provided; and such jury shall upon their oath, &c., "inquire of, and assess, and give a verdict for the sum of money to be paid for the purchase of such lands, (except for such interest therein as shall have been of right purchased by the said Company

W. H. Watson, in support of the demurrer (a).—The plaintiffs, instead of bringing this action against the Company, ought to have claimed compensation under sect. 35 : which provides for lands &c. "*injuriously affected*" by the execution of the powers of the Company's act. Those words are different from those employed in the 20th section prohibiting the Company from "*taking, injuring or damaging*," for the purposes of the act, any house which was not erected on or before the 30th November, 1835, and shew that a different sense was intended by the legislature to the two clauses. Section 20 follows, and uses the same language as the clause (s. 5) which gives power to enter and take lands for the purposes of the railway, and provides for the compensation to persons interested in lands "*taken, used, or injured*," and limits, to a certain extent, the powers given by sect. 5, and evidently applies to the same class of cases. The words in sect. 35 are larger, and calculated to include all sorts of injuries caused by the execution of the powers of the act. That being so, it is to be presumed that the legislature intended that the Company should be protected from actions by the compensation clause, which is amply sufficient for the purposes of parties injured, as in the case of *Rez v. Pease* (b), it was held that the legislature, in consideration of the great advantage furnished to the public by the railway, must have contemplated some interference

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from any other person), and also the sum of money to be paid by way of satisfaction or compensation, either for the damages which shall before that time have been done or sustained as aforesaid, or for the future temporary or perpetual, or for any recurring damages which shall have been so done or sustained as aforesaid, and the cause or causes of which shall have been in part only obviated, removed, or repaired by the said

Company, and which cannot or will not be further obviated, removed, or repaired by them; which satisfaction or compensation for such damage or loss shall be inquired into, and assessed separately and distinctly from the value of the lands so to be taken or used as aforesaid," and the said sheriff &c. shall give judgment accordingly.

(a) June 22. Before *Parke, Alderson, Gurney, and Rolfe*, Bs.

(b) 4 B. & Ad. 30; 1 N. & M. 690.

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with public rights, and intended to protect the Company from indictment.

The Eastern Counties Railway Act (6 & 7 Will. 4, c. vi.) contains clauses (ss. 9 & 29) very similar to those in the act in question. Section 9 empowers the Company to lower roads, making satisfaction to persons interested in any lands *taken, used, or injured*, and sect. 29 provides for the settling differences in the case of lands taken, used, damaged or injuriously affected by the execution of the act, and directs that such damage shall be assessed separately from the value of the land *so taken or used*. These last words would seem to limit the compensation clause only to lands taken or used by the Company, but in *Regina v. The Eastern Counties Railway Co. (a)*, it was held to include the case of a person whose land was injured by the alteration of the road in front of it, and so impeding the access to it, though no part of the land was actually touched. So in this case the act gives a sufficient remedy without the necessity of resorting to an action, which would, if maintainable, occasion the pulling down of the station and embankment, and would even entitle the plaintiffs to enter and abate the nuisance for themselves, and so destroy the railway, declared by the act to be a public benefit, or to continue bringing an action till the discontinuance of it by the Company. If so, the whole benefit of the act might be frustrated, in consequence of damage perfectly unforeseen, arising from acts of the Company by unintentionally stopping or diverting springs communicating with lands at a considerable distance.

At all events, the Company are not liable to action for the inconvenience caused by dust &c., unless arising from their negligence. *Turberville v. Stamp (b)*, *Vaughan v. Menlove (c)*.

(a) Antè, Vol. 2, p. 736.

(b) 1 Salk. 13.

(c) 3 Bing. N. C. 468, and see

Aldridge v. The Great Western Railway Company, antè, Vol. 2, p. 852.

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Crompton, contra.—Unless the Company were authorized by the act to injuriously affect the land in question, this damage is no subject for the compensation clause, which applies only to such cases. In others, the parties are left to their rights and remedies at common law. The grammatical construction of the words of sect. 20, admits of no other conclusion, especially as this act is to be considered as a contract with the public, and therefore "*verba fortius accipiantur contra proferentem*" (a). The house in question is clearly within that section, being permanently injured by the damage to the freehold and interest of the reversioner. This is entirely a question of construction of the statute, but if inconvenience were to be the test, such a case might arise as has been supposed of a spring of water being cut off at a distance; but if that should happen not to be discovered till six months after the injury was caused, if the argument on the other side is correct, the remedy would be gone, as the compensation clause would not apply. But that clause was to provide for injuries to be *committed* not to *prohibited* injuries, and therefore this house having been built before the time specified in sect. 20, is within the protection of that clause, and the Company having no right under it to do the act complained of, are liable to this action.

Watson, in reply, cited *Ex parte Farlow* (b) and *Rex v. The Hungerford Market Company* (c), to shew that clauses giving compensation should be liberally construed (d).

Cur. adv. vult.

(a) See *The Stourbridge Canal Co. v. Wheeley*, 2 B. & Ad. 792, and the cases collected in *Priestley v. Foulde*, antè, Vol. 2, p. 441, and *Barrett v. The Stockton and Darlington Railway Co.*, Id. 464.

(b) 2 B. & Ad. 341.

(c) 4 B. & Ad. 592; 1 N. & M. 404.

(d) And see the judgment in *Regina v. The Eastern Counties Railway Co.*, antè, Vol. 2, p. 755.

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PARKE, B., now delivered the judgment of the Court.—

The question raised by the pleadings in the case is, whether the defendants were authorized by their act, in constructing their railway station, to erect a station and embankment so near to the house of the plaintiffs as to obstruct its lights, and cause damage to it by the dust and dirt drifted from it, such house having been erected before the 30th of November, 1835, the house not having been specified in the schedule, nor omitted therefrom by mistake, and no consent in writing to the construction of the station or embankment having been obtained from the plaintiffs or any other person interested in the house. We think the defendants were not authorized, and that the plaintiffs are entitled to our judgment.

The question turns on the 20th sect. of the 6 & 7 Will 4, c. cix. (His Lordship read the section.) Adopting the ordinary grammatical construction of the clause, the Company could neither take the house in question, nor do any act by which it should be injured or damaged; and such construction certainly ought to prevail, unless it lead to an absurdity, or be manifestly repugnant to the intention of the legislature, as collected from the context, in which case the language may be modified so as to obviate such absurdity, or cure such repugnance. The argument, which brought before us all the material clauses of the act, and pointed out some inconveniences arising from construing the proviso according to the ordinary sense of its words, has failed to convince us that this construction is repugnant to the rest of the act, or that any absurdity would follow if it were adopted.

There is, no doubt, some inconvenience to the Company in their being exposed to actions for unforeseen consequential damages arising from their acts to houses, buildings, gardens, &c., not comprised within the schedule, as by stopping springs communicating with them, or the like:

and we are not prepared to say that such inconvenience may not afford a ground, in those cases where the damage could not be foreseen, for limiting the general expression, and exempting the Company from liability to an action, leaving to the party injured his right to compensation for the damage sustained. On that point, however, we pronounce no judgment. But in such a case as this, in which the damage could have been foreseen when the station and embankment were made, we see no reason to qualify the words of the clause, and consequently the Company are liable to an action for damaging the house in question, by reason of the obstructing of its lights, and the nuisance to it by dust and dirt from the erecting of the station and embankment so near to it. As this house was erected before 30th of November, 1835, the Company ought to have considered, before the act was passed, whether the construction of any of these works would be injurious to it, and caused it to be inserted in the schedule; and if that had been done, the owner of the house would have been put on his guard, and might have opposed the passing of the act. It was the fault of the Company to omit it, and they must suffer for the omission; and as they cannot now be permitted to purchase the house directly without the owner's consent, so they cannot be allowed to buy it indirectly, by causing its lights to be obstructed, and then leaving the owner to receive compensation under the acts.

Judgment for the plaintiffs.

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IN THE HOUSE OF LORDS.

March 22. The EDINBURGH and DALKEITH RAILWAY
COMPANY, and WILLIAM MACKENZIE,
W. S., their Clerk *Appellants;*
v.
JOHN WAUCHOPE, Esq., of Edmonstone *Respondent.*

Where by an act of Parliament it was provided, that "every carriage conveying passengers" was to be charged at a rate not exceeding 6d. per ton per mile:—*Held*, that the proper construction is, that the tonnage is to be taken upon the carriage, with the passengers upon it, and that the words, "conveying passengers" is not merely descriptive of the carriages, but indicative of the matters and things which are to be the subject of weighing, and to be in that respect subjected to tonnage.

The fact of no notice, or insufficient notice of the application for a private or local act, being given to an individual affected by it, is no ground for holding that the act, when passed, does not apply to such individual.

A party settling accounts, which may or may not have included, by reason of their generality, certain items, is not thereby precluded from claiming arrears due at the time of settlement, in respect of those items.

IN the year 1826, an act of Parliament (7 Geo. 4, c. xcvi) (a) was passed for making and maintaining a railway from Edinburgh to the south side of the river North Esk, near Dalkeith and Newbattle, with branches therefrom, all within the county of Edinburgh; and by that statute the Edinburgh and Dalkeith Railway Company was duly incorporated into a public Company. The objects and advantages of this undertaking, as set forth in the preamble of the act, were, "The facilitating the conveyance of coal, corn, stone, agricultural produce, lime, and other commodities, from the interior of the county to the city of Edinburgh and to the other places to which the said branches may lead, and also the conveyance of merchandise, manure, and other articles, from the said city, and from the sea-coast, to the interior of the county of Edinburgh, and will thus materially assist the agricultural interest as well as the general communications of that part of the country."

(a) The material sections in this act were the following:—
Sect. 20. "That, in order to compensate John Wauchope of Edmonstone Esquire, for carrying the said railway through

A certain portion of the railway ran through the property of Edmonstone belonging to the respondent, and the bill was

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his property, the said Company shall, and they are hereby required (in addition to the value of the ground to be occupied by the said railway, to be ascertained and paid in manner hereinafter mentioned), to pay to the said John Wauchope, within six months after the passing of this act, the sum of £670; and also to pay to the said John Wauchope, and his heirs and successors in the lands and estate of Edmonstone, so long as the said railway shall continue to be used through the said lands, grounds, or other premises of the said John Wauchope, the sum of one half-penny per ton, upon all goods and articles upon which a tonnage-duty is chargeable or charged in virtue of this act, which shall pass along any part of the said railway, situated within the said lands, grounds, and other premises of the said John Wauchope, excepting the coals and other minerals, corn and other articles, the produce of the said lands and estate; and manure, lime, or other articles, belonging to, or for the use of, the said John Wauchope, or his heirs and successors, in the said lands and estate, or of their tenants or occupiers residing on the same."

Sect. 21. "That the said John Wauchope, and his heirs and successors in the said lands and estate, and their tenants or occupiers residing on the same, shall be entitled to, and have right of, wayleave on the said railway, through the said lands, grounds, and other premises, of the said John Wauchope, free of all ex-

pense, for the conveyance and transport thereon, of all coals or other minerals, corn or other articles, the produce of the said lands, grounds, or other premises of the said John Wauchope; and also for the conveyance and transport on the said railway, free of all expense as aforesaid, of manure, lime, or other articles, belonging to, or for the use of, the said John Wauchope, and his heirs and successors in the said lands and estate, or of their tenants or occupiers residing on the same; and the said company shall not be entitled to ask, demand, take, recover or receive from him or them, any rate or duty for the passing of the aforesaid articles, along that part of the said railway which shall pass through the said lands, grounds, or other premises of the said John Wauchope; but declaring that the said tonnage-duty shall be payable by the said John Wauchope, his heirs and successors in the said lands and estate, and his or their tenants or occupiers of any part of the said lands, on all other parts of the said railway," &c.

Sect. 85. "And in consideration of the great charge and expense which the Company of proprietors for executing this act must incur and sustain in making and maintaining the said railway, and branches thereof, and other works hereby authorized to be made and maintained, be it further enacted, That it shall and may be lawful for the said Company of proprietors, from time to time, and at all times hereafter, to ask, demand, take,

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strenuously opposed by the late Mr. Wauchope, the respondent's father.

recover and receive, to and for the use and benefit of the said Company of proprietors, for the tonnage and conveyance of all minerals, goods, wares, merchandise, and other things which shall be carried or conveyed upon the said railway and branches, or upon any part thereof, the rates and duties hereinafter mentioned, that is to say :

"For all stone &c., such sum as the said Company of proprietors shall, from time to time, direct and appoint, not exceeding the sum of fourpence per ton per mile :

"For all coal, coke, culm, &c., such sum &c., not exceeding fourpence per ton per mile :

"For every carriage conveying passengers, or goods or parcels not exceeding five hundredweight, such sum and sums of money respectively as the said Company of proprietors shall, from time to time, direct and appoint to be taken, not exceeding sixpence per ton per mile :

"And for all other goods, commodities, wares, and merchandise whatsoever, carried on the said railway, such sum or sums as the said Company of proprietors shall, from time to time, direct or appoint, not exceeding sixpence per ton per mile," &c.

Sect. 91. "That it shall and may be lawful to and for the said Company of proprietors, &c., at any general meeting, &c., to fix the price or prices, or sum or sums of money to be charged or taken for the carriage of any parcel (not exceeding five cwt.), such rate not exceeding 1*d.* per mile per cwt., upon the said railways, or any part

thereof respectively, and from time to time to repeal, alter, or vary the said rates as to them shall seem meet, fitting, and reasonable ; and that the said Company shall, from time to time, affix and stick up upon every public wharf, and upon every stop-gate or toll-house on the said railways, an account or list of the several rates of tonnage, &c., and in case any owner or master, or other person belonging to any waggon or other carriage passing upon the said railway, or any collector of the rates, tolls, or duties aforesaid, shall, after such account or list shall be affixed and stuck up as aforesaid, demand and take more than the price or sum or sums of money therein specified and ascertained, such owner, master, collector, or other person as aforesaid, shall forfeit any sum not exceeding 5*l.*, and such bye-laws shall be valid and binding in all cases upon all persons whomsoever."

Sect. 98. "And, for the better ascertaining the tonnage of goods and other things to be charged with the payment of such rates as aforesaid, be it further enacted and declared, That one hundred and twelve pounds avoirdupois shall, for the purpose of this act, be deemed, rated, or estimated as and for one cwt."

Sect. 99. "And be it further enacted, That if any difference shall arise between any collector of the said rates and the owner or person having the charge of any waggon or other carriage, or the

This opposition was withdrawn on the appellants consenting to give him compensation for the privilege of carrying the railway through his property, by agreeing to pay him a tonnage duty on goods and articles conveyed along the railway, and by giving him a right of way-leave on the railway through his estate, free of all expense, for the conveyance and transport of coals or other minerals, corn or other articles, the produce of his estate, and also for manure, lime, or other articles belonging to, or for the use of himself and his heirs, and of their tenants or occupiers residing on the said estate; and also by providing that, in making the railway through his lands, the same should be fenced by the Company on each side to his satisfaction, and that communications by bridges, gates, or doors, or otherwise, across the railway, should be made for the convenience or for the better use, cultivation, and improvement or occupation of his lands to his satisfaction, and that the Company should carry the drainage of water into the present runs of water crossed by the railway, in such manner as not in any way to injure or damage his lands; and that the Company should at all times keep such fences, bridges, doors, or gates, or other works for draining the railway, in complete repair.

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owner of any goods or other things, it shall be lawful for any such collector to stop and detain any such waggon or other carriage, and to weigh, measure, or gauge such waggon or other carriage, and all such goods or other things as shall be therein contained respectively," &c.

2nd. Act. 10 Geo. 4, c. cxxii, "An Act to enable the Edinburgh and Dalkeith Railway Company to raise a further sum of money to make a branch from the said railway to Leith, and for other purposes relating thereto," reciting 7 Geo. 4, c. xviii, enacts, "That all the powers, authorities,

provisions, regulations, directions, privileges, penalties, forfeitures, clauses, restrictions, matters, and things whatsoever contained in the said recited act, except in so far as the same are altered, varied, or repealed, shall extend, and be construed to extend to, and operate and be in force for, the purposes of this act, as fully and effectually, to all intents and purposes, as if the same, and every part thereof, were repeated and re-enacted in this act, and were made part thereof; and the said recited act, and this act, shall, as to all matters and things whatsoever, except as aforesaid, be construed as one act."

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And also by agreeing that Mr. Wauchope should receive, not only full value for the ground to be permanently occupied, but also compensation for any damage that might be done to the adjoining lands; and should also have the privilege of exacting certain duties upon the goods which were conveyed through his property.

The railway was opened in 1831 for the conveyance of goods, and in 1832 for the conveyance of passengers. At first the Company did not act as carriers. They provided no carriages for the conveyance of passengers. Nor did they ever make any charge on carriages conveying passengers according to their weight. Other parties furnished the carriages for this purpose, and entered into an arrangement with the appellants, by which a certain sum was to be paid to them, not according to weight, but according to the number of passengers, at a certain rate per head. At no period was any payment ever made to them according to the tonnage of the carriages, either with or without passengers.

From the opening of the railway in 1832 down to 1835, there were half-yearly settlements by the Railway Company with the respondent, in none of which any way-leave on the conveyance of passengers was included (a).

(a) The forms of account and company and the agent of the respondent were as follow:—

No. 8.—LETTER, D. RANKINE to Mr. S. CUNNINGHAME.

Railway Office, Nov. 12, 1834.

Dear Sir,—I have to intimate to you, that the way-leave due by the Railway Company to Mr. Wauchope of Edmonstone, for the half year ending this term, is, on 32,136 tons, at $\frac{1}{2}d$ £86 19 0

Mr. Wauchope's deposit ground was .595 ac. i. p., but by the abstraction of 20 square yards in improving the entrance, has become .59, which, at £100 per ac. per an. 29 10 0

Leaving a balance due to Mr. Wauchope £37 9 0

Which I shall be happy to pay when you have satisfied yourself of its accuracy. I am, &c.

(Signed) D. RANKINE.

John Smith Cunninghame, Esq., W. S.

No. 9.—RECEIPT by Mr. J. S. CUNNINGHAME.

Edinburgh, Nov. 15, 1834.—Received from the Edinburgh and Dalkeith

The revenue derived from passengers having unexpectedly become a source of very considerable profit to the Company, the original mode of levying the dues was found to be extremely cumbrous and inconvenient. It was accordingly resolved, that the original enactments on this point should be repealed, and that statutory authority should be obtained for enabling the Company to become the carriers, and to charge fares for the conveyance of passengers on their own account, and dues from other parties conveying them, at the rate of a certain sum per head.

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Regular notices of the intention of the Company to apply for a new act of Parliament were given, in conformity with the standing orders of Parliament, but not to the respondent personally.

By this act of Parliament (a), the rates and duties

Railway Company, by the hands of Mr. David Rankine, their manager, the sum of 37*l.* 9*s.*, being, after deduction of 29*l.* 10*s.* for half a year's rent of the Edmonstone dépôt, the balance due to John Wauchope, Esq., of Edmonstone, for way-leave from Whitsunday to Martinmas last, 1834, and the same is hereby discharged.

£37 9 0 Sterling.

(Signed) J. S. CUNNINGHAME.

(s) *3rd. Act.* 4 & 5 Will. 4, c. lxxi, intituled, "An Act to enable the Edinburgh and Dalkeith Railway Company to make a branch from the said railway to the town of Dalkeith; to extend the Leith branch of the said railway; and for other purposes relating thereto," reciting the act 7 Geo. 4, c. xcvi, and 10 Geo. 4, c. cxxii, enacts, "That all the powers, authorities, provisions, regulations, directions, privileges, penalties, forfeitures, clauses, restrictions, matters, and things whatsoever contained in the said recited acts, except in so far as the same are altered, varied, or repealed, shall extend, and be construed to

extend to, and operate and be in force for carrying this act into effect, as fully and effectually, to all intents and purposes, as if the same and every part thereof were repeated and re-enacted in this act, and were made part thereof; and the said recited acts, and this act, shall, as to all matters and things whatsoever, except as aforesaid, be construed as one act, &c.

Sect. 16. "And whereas by the said first-recited act, certain way-leaves were granted to Andrew Wauchope of Niddrie Mareschall, and John Wauchope of Edmonstone, and their heirs and successors in their respective estates, and their

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granted in respect of carriages conveying passengers were repealed, and the Company were entitled to levy and exact tolls or rates and fares "for every person conveyed

tenants or occupiers residing on the same, and to Sir Robert Keith Dick of Prestonfield, Baronet, and his heirs and successors in the estate of Prestonfield; Be it further enacted, That it shall and may be lawful for the said Company of proprietors, or their committee of management, if they shall see fit, to uplift and collect the said way-leaves, or any of them, separately from the rates and duties levied at the time upon the said main line of railway or branches thereof, provided that such rates so levied, and such way-leaves together, shall not exceed the rates and duties authorized to be levied by the said two recited acts, and this act," &c.

Sect. 29. "That the rates and duties by the said recited acts granted for, and in respect of, carriages conveying passengers, shall be, and the same are hereby repealed.

Sect. 30. "That it shall and may be lawful to and for the said Company of proprietors, in regard to the main line and branches thereof, and to and for the said proprietors of the Leith Branch Railway, in regard to such branch and the extension thereof, to demand, receive, and recover, &c. any tolls, rates, or fares, not exceeding the following (that is to say):

"For every person conveyed in or upon any such carriage, any sum not exceeding threepence per mile:

"For every person conveyed in or upon any such carriage, for ascending or descending the Edinburgh

inclined plane, an additional sum not exceeding threepence:

"For every horse, mule, ass, &c. any sum not exceeding sixpence per mile:

"For every calf or pig, sheep, &c. any sum not exceeding threepence per mile:

"For every carriage, of whatever description, not being a carriage adapted and used for travelling on a railway, and not weighing more than one ton, carried or conveyed on a truck or platform, any sum not exceeding one shilling per mile:

"For the use of every machine, for the loading or unloading of ships or vessels, any sum not exceeding twopence per to."

Sect. 31. Proviso "that in all cases where any passengers, cattle, or animals shall be conveyed on the said railway or branches for a less distance than two miles, the said Company of proprietors, or proprietors respectively, are hereby empowered to demand and receive the afore-mentioned tolls, rates, or fares, as the case may be, for two miles, how short soever such distance may be," &c.

Sect. 33. "That it shall be lawful to and for the said Company of proprietors in regard to the said main line and branches thereof, and to and for the said proprietors of the said Leith Branch Railway, in regard to such branch, and the extension thereof, and they are respectively hereby authorized to provide and establish carriages, and to convey upon the

in any such carriage, any sum not exceeding 3*d.* per mile."

After this last act had passed, the Company continued to settle accounts with the agents of the respondent on the same terms as before, receiving from them as usual receipts in full of each termly payment. But at the close of the year 1835, the respondent insisted on dues being paid to him for all carriages conveying passengers according to the combined weight of the carriage and passengers.

The claim when made was resisted. Accordingly, a summons was raised at the instance of the respondent's father, and a record was prepared, in which the following pleas were put in :

For the Pursuer :—

1. In terms of the statute 7 Geo. 4, c. xcvi, the Railway Company was authorized to levy a certain rate of tonnage upon all carriages conveying passengers along the railway; and the pursuer is entitled to one halfpenny per ton on the amount of the tonnage so levied.

2. The right of the pursuer, thus established by statute, he has never renounced or abandoned, either directly or indirectly.

3. The statute 4 & 5 Will. 4, c. lxxi, being a private act,

said railway and branches all such passengers, cattle, and other animals, goods, wares, and merchandise, articles, matters, and things as shall be offered to them for that purpose, and to make such reasonable charges for such conveyance as they may, from time to time, determine upon in addition to the several rates, tolls, or fares by the said recited act, and this act authorized to be taken," &c.

Sect. 37. " That it shall and

may be lawful for the officers or collectors appointed by the said Company of proprietors, and the said proprietors of the Leith Branch Railway within their respective limits, to weigh all waggons and carriages passing on the said railways and branches thereof, as often as may to them, the said officers or collectors, appear necessary for determining the weight of goods carried in such waggons or carriages," &c.

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and its object being to deprive the pursuer of a vested right, is ineffectual for that purpose, seeing that no notice was given to the pursuer of the intention to apply to Parliament for such an act.

For the Defenders (a) :—

1. According to the sound and legal interpretation of the original act of Parliament, the pursuer's way-leave, which is expressly limited to the rates chargeable on "goods and articles," cannot be construed to include the duties levied in respect to the conveyance of passengers.

2. Even supposing the provision in the act of Parliament to be of doubtful meaning, the understanding of both parties as to its import and effect is clearly established by the mode of accounting for the way-leaves adopted by the pursuer, and recognised and homologated by the defenders.

3. As the provisions in the original act, authorizing dues chargeable for the conveyance of passengers, are now repealed, and, at all events, as these dues are not now levied by the amount of tonnage, the pursuer's claim cannot be made effectual.

4. Supposing the pursuer to be successful in his principal claim, he is barred, by the discharges granted by him, from claiming the arrears for bygone years.

5. On the same supposition, the Company are not bound to keep accounts for the purpose of ascertaining the amount of the pursuer's way-leave. This must be done at his own expense, and in such way as he may deem most expedient.

First interlocutor
 appealed from.

On the 16th of June, 1837, the following interlocutor was pronounced :—"The Lord Ordinary having heard parties, and considered the process, repels the de-

(a) The present appellants.

fences, and decerns in terms of the two first conclusions of the libel (a), reserving consideration of the third or alternative conclusion *hoc statu*, and until it be seen whether the defenders furnish the account demanded under the second conclusion: finds the defenders liable in expenses; appoints an account thereof to be given in, and, when lodged, remits the same to the auditor to tax and to report."

(Signed) H. COCKBURN.

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To this interlocutor the following note was subjoined:—

"Note—The pursuer only gave, or was compelled to give way-leave to the defenders on this condition, as enacted in the statute originally establishing the Company (7 Geo. 4, c. xcviij, s. 20), viz., that he was to receive 'one halfpenny per ton upon all *goods and articles* upon which a tonnage-duty is chargeable or charged, *in virtue of this act*, which shall pass along any part of the railway situated within the lands of the said John Wauchope.' Now the 85th section of this statute gives the defenders power to charge a tonnage-duty on '*every carriage conveying passengers*.' It does not describe these carriages, by applying to them the precise terms, '*goods and articles*,' which occur in the 20th section; but uses the words, 'for the tonnage and conveyance of all minerals, goods, wares, merchandize, *and other things* which shall be carried or conveyed upon the said railway.' But this (almost imperceptible) difference is immaterial, because, besides using these general words, the 85th section imposes a tonnage-duty expressly on *carriages carrying passengers*; and it does so on the declaration that such carriages come within

(c) 1st. That the appellants were bound to pay way-leave on all carriages conveying passengers.

2nd. That they should be ordained to give in an account of the

tonnage of all such carriages conveying passengers, and to pay to the respondent the amount of $\frac{1}{4}d.$ per ton due to him thereon.

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the description of goods, wares, merchandize, 'and *other things*' conveyed along the railway. If a carriage carrying passengers be a thing conveyed along the railway, it is difficult to see how it can be held not to be one of the '*articles*' upon which a tonnage-duty is chargeable or charged in virtue of this act."

"If, therefore, the matter stood solely on this first statute, it would be clear that the halfpenny for way-leave was due on this carriage. Nor would the Lord Ordinary consider the past periodical settlements, by which the defenders say that accounts have been adjusted without including this, as any abandonment by the pursuer, or as any evidence that both parties hold it not to be due. The substance of what was done was merely that the defenders, having presented statements to the pursuer of what they thought was due, he, *relying on their accuracy*, took and gave a discharge for what was offered. These statements never disclose what the tonnage is upon, but merely say that they include the whole tonnage conveyed along the railway; and the way-leave *thus said by the defenders to be due* is discharged. But, if their accounts did not contain all that they ought, the defenders cannot take the benefit of their own errors of omission."

"But they say that the last statute, 4 & 5 Will. 4, c. lxxi, s. 29, repeals the tonnage-duties on the carriages, and substitutes direct fares from the passengers, from which it is inferred that the tonnage-duty being abolished, the carriages cease to be articles on which, under the first act, the halfpenny for way-leave was due."

"The Lord Ordinary is by no means satisfied that due Parliamentary notice was given to the pursuer previous to the introduction of this last act. Undoubtedly, no notice was given to him *personally*, nor did the public notices announce any intention to take away his existing rights. If, as the Lord Ordinary is disposed to think, these defects imply a failure to intimate the real design in view, he

would be strongly inclined to hold, in conformity with the principles of *Donald*, 27th November, 1832, that rights previously established by statute could not be taken away by a private act, of which due notice was not given to the party meant to be injured. But it is not necessary to decide on this ground, because the two statutes are not inconsistent. For, in the *first* place, the first act lays the halfpenny for way-leave on all goods and articles upon which a tonnage-duty is chargeable '*in virtue of this act.*' Carriages for passengers was one of these; and the pursuer's interest was fixed by reference to the tonnage-duties *existing at the time he made his bargain*. The Company might afterwards get their arrangements with the public changed, as, for example, by giving up the tonnage-duty on several articles, or by conveying all goods gratis; but this did not necessarily impair the rights of the pursuer, who bargained in reference to the duties *exigible at the time he dealt*. In the *second* place, his rights cannot be taken away by implication. Now the last act repeals the rates and duties granted for and in respect of carriages conveying passengers,' that is, *the rates exigible by the defenders from the public*; but it does not repeal the way-leave payable by the defenders to the pursuer. These two things are quite different; and the fact that no notice was given of any intention to subvert the arrangement *between the Company and the pursuer*, implies that no such design existed, and that the only object was to change the arrangement *between the Company and the public*.

"If the debt be due under the first conclusion, the account called for under the second must plainly be furnished by the defenders. They were only entitled to pass the pursuer's lands, on the condition that they were to pay a halfpenny a ton for the way-leave. The obligation to pay this implies the obligation to keep an account of

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(a) *Donald v. Magistrates of Glasgow and Anderston*, 8 Fac. Dec. 85.

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the tonnage. It may be difficult or impossible to furnish such an account now, but this cannot affect the declaration of the rule in the first instance, though it may ultimately lead to the necessity of doing something under the third or alternative conclusion."

(Signed) "H. C."

Second inter-
 locutor appeal-
 ed from.

Against this interlocutor a reclaiming note was presented by the defenders; but the first division of the Court, of this date, pronounced the following interlocutor: "The Lords having advised this reclaiming note, and heard counsel, adhere to the interlocutor reclaimed against, refuse the desire of the reclaiming note, find expenses due by the defenders, and remit the account, when lodged, to the auditor to tax and report."

Third interlo-
 cutor appealed
 from.

Thereafter the auditor's report was approved of, and decerniture pronounced, of the 29th June, 1838, for the sum of 55*l.* 8*s.* 10*d.*, as the amount of the expenses, which had been paid.

The cause having been remitted to the Lord Ordinary, the defenders were required to lodge an account of the duties due to the pursuer in terms of the second conclusion of the summons.

This was accordingly done, but the account only stated the duties leviable in respect of the weight of the carriages exclusive of the weight of the passengers.

Objections were thereafter lodged to this state by the respondent.

After a full debate on the state and objections, the following interlocutor was, on the 2nd March, 1839, pronounced:—"The Lord Ordinary having heard the counsel for the parties, and considered the account lodged by the defenders, and the objections thereto, finds, that, in ascertaining what is due to the pursuer for his way-leave on carriages conveying passengers, the tonnage-duty is to be taken as laid on the carriages, and not on the passengers

also; therefore repels the objection to the said account, and approves thereof, and decerns: finds the pursuer liable in this part of the discussion; appoints an account thereof to be given in, and, when lodged, remits to the auditor to tax the same and to report."

(Signed) "H. COCKBURN."

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"*Note.*—All that the former judgment did was to decide that, in the words of the statute, the defenders were bound to pay for 'carriages conveying passengers;' but, whether the duty was to be laid on the carriages laden with the passengers, or empty, was not decided; and, in so far as the Lord Ordinary is concerned, was not meant to be decided. This question has now arisen. The Lord Ordinary leaves the defenders' second statute (4 and 5 Will. 4, c. lxxi) entirely out of view, because the pursuer's rights were fixed by the first act (7 Geo. 4, c. xcvi), and were not taken away by the subsequent one. Now the 85th section of the first statute specifies all the articles or things on which a tonnage-duty is chargeable in detail. It is always laid upon the articles, and never on the carriages, with this single exception, that when the case of passengers, and light goods or parcels, not exceeding five cwt. comes to be disposed of, the phraseology is changed, and, instead of being laid on these contents of the carriages, it is laid on the carriages themselves, that is, on the 'carriages conveying passengers,' &c. The very words do not admit of the pursuer's construction, which includes the passengers as subjects of weight along with the carriage. The carriage is the thing that the duty is laid on; and this construction is fortified by the obvious difficulties and inconveniences of ascertaining the additional weight of passengers."

(Signed) "H. C."

The respondent being dissatisfied with this interlocutor,

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brought it under the review of the Inner House, when, on July 4th, 1839, the following interlocutor was pronounced:—"The Lords having resumed consideration of this note, and heard counsel, alter the interlocutor reclaimed against, sustain the pursuer's objections to the account No. 33 of process lodged by the defenders, and remit to the Lord Ordinary to proceed accordingly: find the defenders liable in the expenses of the discussion relative to the said account, and remit to the auditor to tax the account and report.

The cause having returned to the Lord Ordinary, the discussion was again renewed; and, after some further procedure had been resorted to, with a view to ascertain the amount of dues claimed by the respondent, the appellants prepared an amended account (a), containing as near an approximation to what was required of them by the orders of the Court as the circumstances permitted.

Fifth interlocu- On this amended account being lodged, the following

(a) The amended account was as follows:—

	T.	cwt.	qr.	lb.
The average weight of the carriages used in conveying passengers, as stated in the account previously lodged, is	1	10	0	12½
Allowing twenty passengers on an average to each carriage, and assuming the average weight of each passenger to be 1 cwt. 2 qr. 9½ lb. (or fifteen passengers to a ton), the average weight of passengers in each carriage is	1	6	2	18½
Gross weight of each carriage and passengers	2	16	3	3
The number of passengers conveyed, as stated in the account previously lodged, is				925,550
And at the rate of twenty passengers to each carriage, the number of laden carriages is				46,277½
Hence, 46,277½ carriages, at 2 t. 16 cwt. 3 qr. 3 lb., give				132,574 Tons
At one halfpenny per ton =				£276 3 11

Note.—The foregoing amended account is now lodged, with the view of avoiding the expense and delay of further investigation and discussion upon this point, but under reservation always of the defenders' right to maintain their whole defences in the House of Lords, if they shall be advised to carry the case to appeal.

interlocutor was, on the 18th March, 1840, pronounced:—"The Lord Ordinary, of consent of the pursuer, approves of the amended account; decerns against the defenders to make payment to the pursuer of the sum of 276*l.* 3*s.* 11*d.*, as the amount of tonnage on carriages conveying passengers which have passed along the railway, through the pursuer's lands, from the completion of the said railway till the end of the year 1837, conforms to said amended account; and, having heard parties' procurators on the point of expenses, finds the defenders liable to the pursuer in the expenses incurred by him in this case subsequent to the decision of the Court, of date the 4th July, 1839, and decerns; appoints an account of said expenses to be given in, and remits the same to the auditor to tax and report."

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 from.

The forms of Court required that this interlocutor should be brought under review of the Inner House. A short reclaiming note was accordingly presented on behalf of the appellants, when the following interlocutor, of the 21st May, 1840, was pronounced by the Inner House:—"The Lords, of consent, refuse the desire of this reclaiming note, and adhere to the interlocutor reclaimed against."

In all these states, lodged in compliance with the orders of the Court, the appellants introduced a reservation of their right to maintain the whole defences urged by them, if they should be advised to bring the cause by appeal under review.

These interlocutors were submitted to review, for the purpose of altering, varying, or reversing them, and finding the appellants entitled to *absolvitor* from the conclusions of the summons, with costs, for the following among other

REASONS.

- I. According to the true and fair meaning of the agreement, the way-leave granted to the proprietors of Edmonstone cannot, in the circumstances, be held to extend to, or be exigible from the profits or revenues

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derived by the Company from the conveyance of passengers, or any portion thereof.

In considering the points raised by this reason of appeal, the subject naturally divides itself into two separate branches; the one embracing the question whether the respondent can claim way-leave at all on the conveyance of passengers; and the other, supposing such way-leave to be exigible, embracing the consideration of the extent within which it ought to be limited. It will be observed that, although both points were ultimately decided unfavourably to the appellants in the Court below, a distinction was drawn by the Lord Ordinary with regard to the extent of the respondent's claim,—his Lordship holding that it only extended to the carriages for conveying passengers, but not to passengers themselves.

It is agreed on all hands that the act, 7 Geo. 4, c. xcvi, contains the agreement entered into between the Company and the respondent's father. Although ratified by Parliament, the provisions of it fall to be dealt with as the stipulations of any other agreement. Now, as the way-leave granted to the proprietors of Edmonstone is imposed as a burden on the revenues of the Company, the burden so imposed is not to be extended by implication. It cannot be presumed that the Company ever intended to allow the way-leave to be exigible out of portions of their revenue not expressly declared. As the provisions of the statute profess to regulate the extent of the respondent's claim and the appellants' liability, the contract which the parties made for themselves cannot be varied, nor can it be made to include branches of revenue which are not clearly and unambiguously expressed.

In the Court below, indeed, it has been held competent to give, by inference and implication, a meaning to the statutory contract which the parties never gave to it themselves. And, considering that recourse has thus been had to presumption, it is very important to keep in view the

circumstances that existed antecedently to the passing of the bill, as well as the procedure that followed subsequently, from all which it is abundantly obvious, that it was not the understanding of the contracting parties at the time that the revenues derived from the conveyance of passengers should be comprehended under the way-leave.

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The conveyance of passengers was not looked to as a source of profit when the Dalkeith Railway was originally projected. It was not set forth in the act as one of the grounds of public utility; nor was it represented in the prospectus as a source of gain to the shareholders. The proprietors were led to believe that the great utility of the railway was to consist in bringing coal and other minerals to Edinburgh, and carrying manure and the like to the country. The curves of the railway exclude the use of locomotive engines, and accordingly none have ever been used. The appellants, therefore, are at a loss to understand how the respondent can maintain that the revenue exigible from the conveyance of passengers was looked to and expressly meant to be included in the way-leave. The original shareholders never relied on it, and it is hard to believe that it was ever intended to have been made matter of express stipulation that it should be so included.

But the mode in which this agreement was subsequently acted on for nearly four years appears to set this point very conclusively at rest. Accounts were settled half-yearly between the appellants and the late Mr. Wauchope, acting through his law-agent and ordinary man of business. None of them include the tonnage of the carriages employed in the conveyance of passengers, or of the passengers themselves. It cannot, indeed, be pretended that Mr. Wauchope was ignorant of the fact that, contrary to the expectations of the original shareholders, the railway had become a favourite means of transport for passengers. It passed through his grounds at a short distance from his house. And the fact was otherwise quite notorious in the whole

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neighbourhood. Nor can it well be pretended that he was ignorant, or at least had cause to be ignorant of the fact that the half-yearly accounts did not include any tonnage for passengers. These settlements were made through his law-agent, who, from having previously conducted the opposition to the bill in Parliament, and arranged the clauses in the statute, was fully aware of the true nature of Mr. Wauchope's rights, and would not have readily been led to allow so important an item to be omitted if he had conceived at the time that there was a legal claim for it.

The appellants acted uniformly on the same conviction. They kept no account of the tonnage, either of the carriages or of the passengers, because they never imagined that it fell under the way-leave. Their understanding of what was intended by the contract was evinced by their subsequent conduct; and, until immediately before the present action was raised, they had never been led to entertain a doubt that Mr. Wauchope was acting on the same understanding. Even although these half-yearly settlements might not of themselves be sufficient to debar all claim at the instance of the respondent, they are very material, as affording fair elements for interpreting the agreement, and for shewing that the provisions introduced into the act of Parliament were not conceived to be of that extensive nature for which the respondent has latterly been pleased to contend, and which the Court below has adopted.

By the 20th section, the appellants are bound to pay to the proprietors of Edmonstone "the sum of one halfpenny per ton upon all *goods and articles* upon which a tonnage-duty is chargeable or charged in virtue of this act." Now, the duty is not imposed on whatever is conveyed along the railway. Had every thing which passed along it been made the subject of this imposition, the matter would have been sufficiently clear. But it is regulated quite otherwise. It cannot escape observation, 1st, That it is not laid on what is transported, but on the tonnage-duty to be charged, or

chargeable: and 2nd, That it is not laid on every thing so transported, but merely on the "*goods and articles* for which a tonnage-duty is leviable." That "*goods and articles*" are terms which are not synonymous or convertible with "*passengers*" is abundantly clear. It is apprehended, on the contrary, that they are totally distinct from each other. So distinct, indeed, that the former do not, and cannot in their ordinary acceptation, include the latter. These words occur in many of the other clauses of the statute. And it is plain that, while the term "*goods*" is used to denote wares and merchandise, the term "*articles*" is employed to denote coal, lime, corn, and the like. In the sections immediately following, it is used in this and no other sense.

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Although the way-leave in favour of the proprietors of Edmonstone was thus limited to "*goods and articles*," the right of the Company to exact duties was broader and more comprehensive. They were entitled by the 85th section to demand duties "for all minerals, goods, wares, merchandize, and other things which shall be carried or conveyed upon the said railway." The section enumerates the different rates of duty exigible from what may be carried or conveyed on the railway; and after specifying a variety of different subjects which fall properly under the denomination of goods or articles, mentions carriages conveying passengers, or light goods not exceeding five cwt. This last stands on a totally different footing from all the rest. In all the others the duty is charged for the goods and articles exclusive of the carriage conveying them, while, in the last, it is laid upon the carriage exclusive of the passengers conveyed.

This provision, then, as to passengers, being of so peculiar a nature, it remains to be considered whether the way-leave was made exigible from it. It has been already mentioned that no *tonnage-duty* whatever has ever been levied by the Company under this provision of the statute.

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They have never charged toll-dues according to the weight either of the carriage or of the passengers. At first they entered into arrangements with different individuals, by which they let to them the privilege of conveying passengers, under which arrangements they received at the rate of so much per head on every passenger. Latterly, they carried on their own account; and since the last act, 4 & 5 Will. 4, was passed, they have excluded all others from carrying passengers. Yet the way-leave is only exigible in respect of those "*goods and articles*" for which "*tonnage-duty*" is chargeable.

Suppose, then, that the appellants had carried passengers on their own account from the opening of the railway, on what ground could the respondent have maintained that the revenue received from this source fell under his way-leave? On this supposition, no tonnage duty would have been levied at all. The carriages being their own, they would have been treated merely as the means of transport, while the passengers would have been charged at a certain rate per head, and most unquestionably not according to a varying scale of their respective weights. No tonnage-duty, therefore, being levied upon the weight either of the carriage or upon the passengers, where would there have been any ground-work for the respondent's claim for a way-leave on those *goods and articles* for which a *tonnage-duty* was exigible? And it can make no difference on the rights and interests of Mr. Wauchope whether the Company were carriers on their own account, charging the passengers at a certain rate per head, or farmed the privilege to other parties, from whom they received a rent corresponding to the number of passengers conveyed, though at a lower rate than that at which they themselves, as carriers, would have charged. But all this, while it shews, on the one hand, that no tonnage-duties have ever been levied from the conveyance of passengers, so as to admit of being brought within the stipulation contained in the 20th sec-

tion of the act, proves, at the same time, that the conveyance of passengers never could have been contemplated by the parties as one of the subjects from which the way-leave was to be leviable. Had it been meant to make the way-leave as comprehensive as is now claimed, it would have been made dependent on what was conveyed along the railway, and not limited to the goods and articles for which tonnage-duty was chargeable.

The very inconvenience to the public which would arise from charging a tonnage-duty on passengers affords a very satisfactory evidence to shew that it never could have been intended to make it the subject of way-leave to the proprietors of Edmonstone.

But further, it must be kept in view that, by the recent statute, (4 & 5 Will. 4), the provisions of the first act with regard to the rates and duties for carriages conveying passengers were repealed; and by other sections new regulations were substituted. Now, this statute was not introduced with reference to the present discussion, or in the anticipated contemplation of its occurring. No question had at that time been raised as to the amount of way-leave payable to the respondent. The utmost harmony then prevailed as to its amount, as well as to the subjects in respect of which it was paid. That act obtained the Royal assent on the 27th June, 1834, and the subsequent half-yearly settlement took place at Martinmas thereafter, and a receipt was granted for the balance—the accounts being made up on the same principles as before. By this act the appellants took fuller powers to themselves to act as carriers on their own railway. No tonnage-duty was thereafter to be charged, either in respect of passengers or of the carriages conveying them; and all that the Company did was merely to adopt a more beneficial arrangement for the conveyance of passengers.

On looking to the 85th section of the act 7 Geo. 4,

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c. xcvi, which regulates the exaction of tolls and duties, it will be seen that in no case whatever were the dues authorized to be charged on the carriage, as well as on the goods and articles conveyed. In all the cases, except that of passengers, the dues are only chargeable on the subjects conveyed. It would, indeed, have been a most unfair act of extortion to demand toll for the carriage over and above its contents. Now, if the principle of the regulation, as regards all the other dues, is to exclude the weight of the carriage, so as to prevent the exaction of duty in respect both of the carriage and the subject conveyed, it seems most unreasonable to suppose that this principle would have been deviated from in the case of passengers. Unquestionably the appellants themselves never, in practice, exacted dues in respect of both; passengers are not identical with or comprehended under the terms "goods and articles," and the respondent cannot be warranted in exacting it in respect of tonnage-duties, which the appellants themselves have never charged. The provisions of the statute, neither in letter or in spirit, give any sanction to the claim of the respondent in its present extravagant form.

II. As the respondent's father granted discharges to the Company for the way-leave, payable till Martinmas, 1834, the respondent is thereby barred from claiming any arrears for former years, even supposing the principle contended for by him to be well founded.

The appellants have already had occasion to advert to the effect of these discharges on the construction of the agreement, by shewing the understanding on which all parties acted for a series of years; and that, too, at a time when the whole bearings of the contract were fresh in their recollection. They do not intend to resume that argument, even although the principle of the interlocutors pronounced in the Court below were to be adhered to, the claim for the

increased rate of way-leave must be restricted to the terms following *Martinmas*, 1834. The receipts granted by the man of business who acted on behalf of the respondent's father are clear and explicit. They are discharges in full of all claims up to the periods at which they were respectively granted. The accounts were made up by the appellants perfectly *bond fide*. They were framed under the conviction that the principle was in all respects correct; and, as these accounts were not only acquiesced in but adopted, and that, too, while every means of investigation was open to the respondent, he is barred from now carrying the account back into other years, for which regular and formal discharges were granted.

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The reasons stated in the respondent's case were as follow:—

- I. Because, by 7 Geo. 4, c. xcvi, carriages conveying passengers are chargeable with tonnage-duty by the appellants; and consequently, the respondent is entitled to the sum of one halfpenny per ton on all such carriages conveying passengers upon the railway through his lands.
- II. Because the right of the respondent to levy this duty for way-leave on carriages conveying passengers is not taken away or affected by the act 4 & 5 Will. 4, c. lxxi.
- III. Because the right of the respondent to levy this duty for way-leave in respect of carriages conveying passengers has reference to the tonnage of the carriages when laden, including the weight both of the carriages and of the passengers conveyed on them.

The arguments in support of these reasons were as follow:—

1. The respondent maintains that carriages conveying

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passengers are chargeable with tonnage-duty to the Company, and that the respondent has right to way-leave upon them under the original statute.

The principle of construction applicable to the provision of the statute, giving the respondent his compensation for way-leave, is clearly that which would be applied to an ordinary civil contract. The statute in question is a private act, giving, on the one hand, to the appellants, along with various other privileges and valuable rights, the right to carry their railway through the estate of the respondent; and giving, on the other hand, to the respondent compensation for the use of his property. These enactments were the result of previous negotiations between the appellants and the late Mr. Wauchope, with the view to procure his consent to the railway being carried through his property. This consent was only obtained upon certain stipulated conditions, which were embodied in the act of Parliament. All this is admitted and founded upon in the defences as part of the appellants' case. The enactment in question, then, is a provision of a private act of Parliament admittedly inserted for the purpose of embodying, and giving the sanction of Parliament to an onerous agreement entered into between private parties. In regard to the construction of such an enactment, the only question to be determined is, what was the matter agreed on? And this is to be judged of by the ordinary rules of construction applicable to contracts.

The provisions of the statute, however, are in themselves quite clear and conclusive. The 20th section gives the respondent "the sum of one halfpenny per ton upon all goods and articles upon which a *tonnage-duty is chargeable or charged.*" The 85th section, which imposes the duty to be levied by the Company "for the tonnage and conveyance of all minerals, goods, wares, merchandize, and other things, which shall be carried or conveyed upon the

said railway," specifies a tonnage duty "*for every carriage conveying passengers* or goods, or parcels not exceeding five cwt., such sum and sums of money respectively as the said Company of proprietors shall from time to time direct and appoint to be taken, not exceeding sixpence per ton per mile." From these two clauses of the statute, the right of the respondent to way-leave on carriages conveying passengers appears to the respondent to be sufficiently clear and undeniable. The former clause gives the right to way-leave upon everything upon which tonnage-duty is chargeable or charged,—while the latter clause specially enumerates "*carriages conveying passengers*" among the articles upon which tonnage is to be levied. The respondent, therefore, submits it to be clear, that he has a right, under this original act, to his way-leave upon carriages conveying passengers, as part of the agreed-on consideration for permitting the railway to pass through his property.

The 20th section, under the very general and comprehensive phrase, "*goods and articles*," makes everything liable for way-leave to the respondent, which is chargeable with tonnage-duty by the appellants. In short, he was to receive, as his stipulated compensation for way-leave, a proportion of all the profits drawn by the Company upon everything conveyed through his lands.

Tonnage-duty is the only description of duty which the Company are authorized by the act to draw, and therefore the intention of parties seemed to be fully expressed when Mr. Wauchope got right to a payment upon "*all goods and articles upon which a tonnage-duty is chargeable or charged*;" that is, as he understood it, upon every subject of duty. The appellants do not deny that carriages conveying passengers were subjects of such duty under the act. They admit, that they have all along levied duties on passengers, and that they took upon them, for their own greater convenience, to make a change upon the mode of levying those duties pre-

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scribed by the act. But they allege that the claim of the respondent to his way-leave on carriages conveying passengers, which would otherwise be clearly good, is excluded by the peculiar words "goods and articles," by which the subjects of his right are described in the statute. These words, they maintain, cannot apply to carriages conveying passengers, or according to the more involved and ingenious form in which they have expressed their plea, they maintain that the respondent's "way-leave, which is expressly limited to the rates chargeable on goods and articles," cannot be construed to "include the duties levied in respect of the conveyance of passengers." This plea could not be seriously maintained in regard to the construction of an ordinary written contract between parties, not embodied in an act of Parliament. It is quite obvious that the parties used these words, whether correctly or not, with the intention of making Mr. Wauchope's right to his way-leave as broad as the right of the appellants to their tonnage-duties, and effect will be given, just as in the case of an ordinary contract, to the clear intention of parties, without regard to any verbal inaccuracy into which they may have fallen.

In the commencement of the 85th section, where authority is given to the Company generally to levy tonnage-duties, with reference to the specification of the subjects and amount of these duties immediately following, the articles liable to tonnage are described in general words,—"all minerals, goods, wares, merchandise, and *other things*,"—certainly quite as inapplicable as the expression "goods and articles," to the subject of a duty to be levied in respect of the conveyance of passengers. Yet it has not been denied, that carriages conveying passengers are among the articles immediately referred to and comprehended by these general words of the 85th section.

But, in fact, the whole of this argument of the appellants rests upon an entire misconception both of the phra-

seology of the statute and of the claim of the respondent. It is in vain to argue, that the expression "*goods and articles*" cannot refer to passengers. The 85th section of the statute imposes no tonnage-duty upon passengers separately, and the respondent claims no way-leave on passengers separately. The tonnage-duty is imposed on "every carriage conveying passengers or goods, or parcels not exceeding five cwt.;" that is, on every carriage-load of passengers, goods, or parcels. And the respondent claims in this action his way-leave on every such carriage and carriage-load of passengers. But each carriage-load of passengers is clearly, and in the strictest sense of the words, an article upon which tonnage-duty is chargeable under the statute.

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The appellants founded something in the Court below upon the termly settlement of accounts between them and the respondent, as shewing the understanding of parties that the act did not give right to levy duties upon carriages conveying passengers. The respondent all along conceived himself entitled to duty upon every article liable in tonnage to the Company, including carriages conveying passengers. He took the statement of the appellants as to the amount of tonnage, understanding, of course, that it included the tonnage of such carriages. The appellants, however, acting, as they say, upon a different understanding of the statute, made their statements exclusive of the tonnage of carriages conveying passengers; while they were framed in general terms, so that this could not appear. Upon the ordinary principles of law, applicable to the settlement of accounts, this was obviously an error on the part of the appellants, against which the respondent, assuming him to be right in his construction of the statute, is entitled to his remedy in this action.

II. The respondent will next advert to the separate defence against his claim, rested upon the last act obtained by the Railway Company.

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The appellants contend that, assuming the right of the respondent to payment of way-leave upon carriages conveying passengers under the original stat. 7 Geo. 4, this right was affected, or rather altogether taken away, by the later act, 4 & 5 Will. 4, c. lxxi. The respondent humbly submits, that this ground of defence is altogether untenable. —First, Because the requisite notice of such repeal or alteration not having been given before the passing of the act, it cannot be held to take away the legal and vested right of the respondent, established in him by the previous statute; —and secondly, because the later statute clearly contains no provisions for taking away, or in any manner affecting the right of the respondent to his way-leave.

1. So far are private acts of Parliament from receiving effect against the rights of parties who were strangers to their passing, or did not receive due notice of their provisions respecting them, that they are universally laid down to be mere agreements between parties sanctioned and recorded by Parliament.

It is now contended that the terms of this agreement are to be altered without the consent or even knowledge of one of the parties to it; and that his rights obtained under it, and confirmed to him by Parliament, are to be taken away in his absence by an act obtained upon the petition, and for the benefit, of a private party. In short, the appellants contend, that having, in 1803, obtained Mr. Wauchope's consent to carry the Railway through his lands upon certain conditions, they contrived, in 1834, to obtain more favourable terms in his absence. This would plainly be a fraud both upon the respondent and upon Parliament, which must have assumed that it was legislating upon the agreement of parties on the last as well as on the former occasion.

2. The respondent, moreover, maintains, that, independently of the want of notice, there is no pretence for holding that the act affects, or was intended to affect, his right

of way-leave. When the appellants went to Parliament for this act, it was upon a petition setting forth that their object was to establish "a more convenient method of charging for passengers." The object of the act, in regard to rates upon carriages conveying passengers, as it is to be collected from these initiatory proceedings, clearly was to alter the rates payable to the Company, but not to make any change upon the respondent's right of way-leave.

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The respondent, however, humbly conceives that this is equally clear and demonstrable from the terms of the act itself. The rates which, by the previous act, the Company were entitled to draw in respect of carriages conveying passengers are repealed by sect. 29; and by the following section, they are authorized to levy rates upon the number of persons conveyed, but there is nowhere in the act a repeal of the provision of the former statute, giving the proprietor of Edmondstone the right to levy way-leave, nor anything implying that it was meant to be affected. On the contrary, the act, (sect. 16), makes special mention of this right of way-leave as granted by the former act, and that in terms plainly implying that it was just to continue upon the footing established by that act. The right of the respondent to way-leave upon carriages conveying passengers, thus stands, as it has all along done, upon the original stat. 7 Geo. 4, which gives that right to all articles chargeable with tonnage-duty to the Company *under that statute*. The mode of levying their duties by the Company having been subsequently altered, is a circumstance which clearly cannot affect the right given by that act to way-leave upon all articles which the same act declared subject to tonnage. A similar change might have been made in regard to the duties leviable by the Company upon every description of article conveyed along the railway; and the appellants, to be consistent with their present plea, must maintain the flagrant absurdity that the respondent would, in that event, have tacitly and by implication lost his entire

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right of way-leave, which constituted his compensation for permitting the railway to pass through his property.

III. The respondent has, in conclusion, to maintain, in answer to the last ground upon which the appellants have resisted his claim, that his way-leave, in respect of carriages conveying passengers, is chargeable upon the tonnage of the carriages *with their load*, and not upon the tonnage of the carriages only *exclusive of passengers*.

The unreasonableness of the view maintained by the appellants upon this branch of their case, is sufficiently obvious upon the bare statement of it. It appears altogether incredible that it can have been intended to lay the tonnage, not upon the passengers conveyed, but upon the carriage conveying them. Among the many absurdities resulting from so preposterous a mode of charging which readily suggest themselves, it may be sufficient to remark that the same amount of tonnage would be levied upon a carriage conveying a single passenger, as upon one laden with its full complement of passengers, which the appellants state to amount to thirty.

The terms of the statute are, however, in themselves clear and decisive upon the point. The tonnage is laid upon every *carriage conveying passengers* at the rate of sixpence *per ton* per mile of the whole aggregate weight. The respondent cannot conceive how the words "carriage conveying passengers," are to be read in any other sense than that the weight of the carriages is to be ascertained when they are in the act of conveying passengers. If the intention of the act had been that which the appellants now attribute to it, the duty would have been laid not upon carriages conveying passengers, but upon carriages used for the purpose of conveying passengers.

It seems to the respondent to be conclusive of this whole question, that it is undeniable, and not denied, that, if by this expression "carriages conveying passengers," a tonnage-duty was not authorized to be levied upon the passen-

gers as well as the carriages, then passengers were not chargeable at all under the Company's first act. But goods and small parcels, *i. e.* parcels not exceeding five cwt., are in precisely the same situation as passengers in regard to the provision of the original act as to tonnage. The duty is to be levied "for every carriage conveying passengers, or goods, or parcels not exceeding five hundred-weight." Now surely it will hardly be contended that goods and parcels of this description were to be exempted from duty, and yet it is clearly impossible for the appellants to escape from this altogether untenable conclusion, upon the assumption of their present plea being well founded.

It humbly appears to the respondent, that the purpose of the late statute is sufficiently plain and simple, and shews clearly that passengers, goods, and small parcels must all have been subject to tonnage under the previous act. The Company finding it desirable to change the mode of charging on passengers, the act repeals the rates and duties formerly granted for and in respect of carriages conveying passengers, and it then proceeds to give a surrogate or equivalent for them. But it was only the *mode* of charging the duties that had been found objectionable; and, accordingly, the equivalent consists of duties upon the very same subjects, but chargeable according to a new mode, *viz.*:—First, a duty to be levied on passengers in the shape of head-money; and secondly, a power to the Company to make orders for fixing the sums to be charged in respect of parcels not exceeding five cwt. According to the appellants' plea, the duties granted by the last act would be no equivalent for those in the former statute and now repealed, but new and additional duties upon articles not formerly subject to duty. This view is excluded by the terms and whole conception of the late act.

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Sir F. Pollock, *Attorney-General*, and Kelly, for the respondents.

The arguments at the hearing were in substance the same as those given in support of the printed reasons, and the *Attorney-General* cited, in support of the argument that the respondent was precluded from urging his claim by reason of the settlements which had taken place between the parties, the case of *Bramston v. Robins* (a).

LORD BROUGHAM.—My Lords, undoubtedly we often feel considerable reason to hesitate in coming to a conclusion as to the construction of a private act of Parliament, arising from the somewhat careless manner in which acts of this sort, as well as some other acts, are wont to be framed. Nevertheless, upon the whole, I think that the construction is a sound one which has been put on this act by the Court below, viz. that one halfpenny per ton is to be taken upon all goods and articles upon which a tonnage-duty is chargeable or charged according to the act. Well, then, in the 85th section we find that every carriage conveying passengers is to be charged by, or to, or for the Company at a rate not exceeding 6*d.* per ton per mile; that, therefore, is a tonnage, and the question is, is that tonnage to be taken upon the carriages, or is it to be taken upon the carriages conveying passengers? I apprehend that the sound construction, and the more natural construction is, that the tonnage is to be taken upon carriages conveying passengers, and that it will not be accurate to hold that the words “conveying passengers” are merely descriptive of the kind of carriage, but that they are indicative of the matters and things which are to be the subject of weighing, and to be in that respect subjected to a tonnage not exceeding 6*d.* a ton per mile. I therefore think that a sound construction has been put upon the act, for it is also to be observed that

(a) 4 Bing. 11.

the passengers, or the Company who escape, pay Mr. Wauchope so much per ton altogether, and in no other way can it be taken.

With respect to the other objection which has been taken, arising upon the 91st section (*a*), undoubtedly, at first, till it came to be examined into, it did seem to raise very great difficulty, and to throw a great obstruction in the way of the interpretation which has been fixed by the Court below on the 85th section. But when you come to look at it, it clearly appears, that this is a rule which applies entirely to the conveyance of goods by carriers using the railroad, and is intended to protect the customers of those carriers from a larger charge by them against their customers than twenty pence per ton: and it does not apply to the Company themselves in carrying passengers, which they really do not appear to have had power to do at that period, nor until the act of the 4 & 5 Will. 4 gave them the power. It is a great mistake to suppose that they can, as a Company, do, and that they are not prevented from doing that which a Company must be incorporated for the purpose of doing.

The last point appears now to be abandoned on both sides. It was repeated on the one side and abandoned on the other. The principle seems to me to be clear; and I trust it will be so considered in the Courts below, that no notice or want of notice in a private act or local act is any ground for holding that the act does not apply; and it seems to me that was very properly entirely abandoned on the part of the respondents.

Lord COTTENHAM.—My Lords, upon the last point which has been adverted to, it is only necessary to say a few words, in order that we may not again have a similar question brought before this House.

(a) *Antè*, p. 234, note.

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It has been most properly abandoned at the bar, but on the papers and the opinions it does appear that an impression has existed, that an act of Parliament is or is not to bind according as there may or may not be proof of the individual to be affected by it having had notice of the act of Parliament which was in progress. [Lord *Brougham*.—That the standing orders for protecting individuals have not been complied with, and, not being complied with, that affects the act of Parliament itself.] There is no foundation for such an idea; however, such an opinion appears to have existed in Scotland, but I hope it will cease to exist for the future.

With regard to the merits of the case, so far as they have been brought under our consideration, upon the first point that has been made by the appellants, I have already intimated an opinion that there is no doubt at all, whatever may be the rule by which the weight is to be found, that it falls under the 20th section (a); and if the words are attended to, I am surprised that any doubt should have existed; because the 85th section (a) (which imposes the duty upon carriages) describes the things to be charged as things which should be carried or conveyed upon the railroad, upon which certain rates are fixed; and among the enumeration of those things upon which a rate is fixed, we find a carriage; and the 20th section gives Mr. Wauchope the sum of one halfpenny per ton upon all goods and articles upon which a tonnage-duty is chargeable or charged in virtue of this act, which shall pass along any part of the said railway. The sole argument must rest upon proving that that which in one section is called an article, is not such a thing as is described in the other. The doubt arises from the mode in which the weight is to be ascertained; and if the 91st section had imposed a rate upon the small parcels, as described in the 85th section,

(a) *Antè*, pp. 232, 233, note.

that would have furnished a very strong argument indeed in favour of the appellants; but that section has, I think, no reference to the provision in the act which imposes tolls or duties to be paid as a remuneration to the Company for the use of their railway.

Now passengers, if their weight is not to be included in the weight of the carriage, and these small parcels, of less than five cwt. (for I assume this to be the proper construction), escape without payment altogether, because there is no provision by which passengers are to be the subject of the rate, or by which small parcels are to be the subject of the rate, the 91st section clearly not applying to the present subject-matter. That is a strong reason for supposing that it could not have been intended that passengers and such small parcels should have been altogether omitted; the argument on the one side being, in fact, that it was included by being weighed in the weight of the carriage; and on the other side, it being contended that it was excluded by the 85th section, and that there was no other provision by which it was included.

However imperfect the expression in the section is, it is much more consistent with the terms used to consider the weight of the carriage as estimated by that which at the time was upon it, than by its being estimated without reference to what was upon it. It is the weight of the carriage conveying the passengers. So long as the carriage was conveying passengers there must be an additional weight to that which the carriage would have had if not conveying passengers, and the rate is to be according to the terms of the section, "for every carriage conveying passengers." Now there is no doubt that if, in the ordinary mode of expression, you were describing the weight of a carriage conveying passengers, you would consider that the carriage must be weighed with the passengers upon it, otherwise it would be the weight of the carriage not conveying passengers. My Lords, the provisions of the act

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are exceedingly ambiguous, and no doubt extremely inaccurate; but upon the whole I am of opinion, that the Court of Session has come to a right conclusion upon the construction of the act, and that Mr. Wauchope is entitled to his halfpenny per ton upon the weight of the carriage, with the addition, as it existed, of the passengers upon it; and if what is stated at the bar be founded on fact (though nothing appears upon the subject that I am aware of), namely, that the Company have actually paid to him at that rate upon those small parcels under five cwt., for the parcels of goods so carried, and for the carriages so carrying them, then it is a construction they themselves have put upon one portion of the 85th section, and they cannot be very much surprised that we have made it applicable to the conveyance of passengers.

Lord CAMPBELL.—My Lords, I am entirely of the same opinion. The question seems to me to turn exclusively upon the construction of the act of 7 Geo. 4, and under the 85th section of that act, I am of opinion that the Company are entitled to receive tonnage upon the carriage, with its contents, including the passengers; that upon every carriage conveying passengers, or goods, or parcels, not exceeding five cwt., the Company was entitled to demand such sum and sums of money respectively as the Company of proprietors should from time to time direct to be taken, not exceeding 6*d.* per ton per mile. I think that the carriage must be weighed, with its contents, consisting of passengers or parcels. Then that being so, the question is, whether, under the 20th section of that act, this clause relating to carriages and parcels does not apply, and whether a carriage is not to be considered an article upon which a tonnage-duty is charged or chargeable? and I am clearly of opinion that it is such an article, and therefore, that one halfpenny per ton, upon the sum received upon these carriages by the Company, is payable to Mr. Wauchope.

With regard to the arrears, there seems no reason in the world why the arrears should not be payable, because there has not been any acquiescence; for we know that Mr. Wauchope was aware of the circumstances. He took the accounts as they were rendered to him, and there are no facts at all that bring this case within the case referred to from Bingham's Reports (a).

My Lords, I think it right to say a word before I sit down upon the point that has been raised with regard to an act of Parliament being held inoperative by a Court of justice, because the forms in respect of an act of Parliament have not been complied with. There seems great reason to believe that that notion has prevailed to a considerable extent in Scotland. For we have it here brought forward as a substantive ground on which the act 4 & 5 Will. 4 could not apply. The language being, "that the statute of the 4 & 5 Will. 4 being a private act, and no notice given to the pursuer of the intention to apply, and so on," it would appear that that defence was entered into, and the fact was examined into, and an inquiry, whether notice was given to him personally or by advertisement in the newspapers; and the Lord Ordinary, in the note which he appends to his interlocutor, gives great weight to this. The Lord Ordinary says, "he is by no means satisfied that due Parliamentary notice was given to the pursuer previous to the introduction of the last act." Undoubtedly no notice was given to him personally, nor did the public notices announce any intention to take away his existing rights. If, as the Lord Ordinary is disposed to think, these defects imply a failure to intimate the real design in view, he would be strongly inclined to hold, in conformity with the principles of *Donald*, 27th November, 1832 (b), that rights previously established could not be taken away by a private act, of which due notice was not given to the party meant to be injured.

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(a) *Bramston v. Robins*, 4 Bing. 11.(b) *Antè*, p. 243.

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Therefore my Lord Ordinary seems to have been distinctly of opinion that, if this act did receive that construction, it would clearly take away the right to this tonnage from Mr. Wauchope, and would have had that effect if notice had been given to him before the bill was introduced into the House of Commons; but that notice not having been given, it could have no such effect, and therefore the act is wholly inoperative. I must express some surprise that such a notion should have prevailed. It seems to me there is no foundation for it whatever; all that a Court of justice can look to is the Parliamentary bill; they see that an act has passed both Houses of Parliament, and that it has received the Royal assent, and no Court of justice can inquire into the manner in which it was introduced into Parliament, what was done previously to its being introduced, or what passed in Parliament during various stages of its progress through both Houses of Parliament. I therefore trust that no such inquiry will hereafter be entered into in Scotland, and that due effect will be given to every act of Parliament, both private as well as public, upon the first construction which appears to arise upon it.

LORD BROUGHAM.—It ought to be observed, that the Lord Ordinary is not quite correct in the view he takes of the principle in the case of *Donald (a)*. I do not agree with what is said as to that case: it does not go by any means so far; it is only used as a topic, as it were, in the construction of the act of Parliament, and I think improperly used.

LORD COTTENHAM.—I move your Lordships that the interlocutors be affirmed, with costs.

Ordered and adjudged, that the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed, with costs.

(a) *Antà*, p. 243.

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Ex parte THE PROVOST AND FELLOWS OF ETON COLLEGE
re THE LONDON AND BIRMINGHAM RAILWAY COM-
 PANY.

May 7.

THIS was a petition presented by the Provost and Fellows of Eton College, for the purpose of procuring the re-investment of a sum of £500, part of a much larger sum, the purchase-money of land taken by the London and Birmingham Railway Company for the purposes of their railway, which had been paid into the Bank of England in the name of the Accountant-general, in accordance with the provisions of the 39th section of 3 & 4 Will. 4, c. xxxvi., and for the costs of the application. The Railway Company had already paid the costs of one re-investment, and a question arose on this petition, whether the Railway Company were, under the provisions of their act, liable to pay the costs of this and all future applications for the re-investment of the money then remaining in Court.

Where, by a railway act, a power was reserved to the Court to order the reasonable expenses of re-investing a sum of money in the Bank, the produce of land purchased by the Company, to be paid by the Company, the Court will order the costs of two applications for re-investment of parts of the same sum to be paid by the Company.

Semble, the costs of any further application must be borne by the parties applying.

Mr. *Shadwell*, for the petitioners.

Mr. *Bacon*, for the Company.

V. C. KNIGHT BRUCE.—I make the order as prayed, except as to costs, in respect of which I give the petitioners their option, either to take the costs of the present application, or to reserve them until a future application is made by them on account of the residue of the purchase-money in Court. If the petitioners take the costs.

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of their present petition, they will do so without prejudice to the question of the costs of any future application. I will give the petitioners the costs of two applications, and therefore they shall have the costs of the present one, if they desire it; but I think they had better reserve them, as the sum in respect of which this application is made is very small. It will not, however, follow, that, because I give the costs of this petition, therefore I shall give the costs of any future applications; I shall reserve to myself the exercise of the discretionary power with regard to them which is given to me by the act (a).

(a) The 39th section. "That, if any money shall be agreed or awarded to be paid for the purchase of any land, to be taken or used by virtue of the powers of this act, or &c., which any corporation, tenant for life or in tail, or feoffee in trust, executor, administrator, husband, guardian, committee, or other trustee for or on behalf of any infant, idiot, lunatic, feme covert, or other cestui que trust, or any person whose lands are limited in strict or other settlement, or any person under any other disability or incapacity, shall be entitled unto, interested in, or hereby capacitated to convey, such money shall, in case the same shall amount to or exceed the sum of £200, with all convenient speed, be paid into the Bank of England in the name and with the privity of the Accountant-general of the Court of Exchequer, to be placed to his account there, [in manner prescribed by 1 Geo. 4, c. 35], and shall, when so paid in, there remain until the same shall, by order of the said Court, made in a summary way upon petition to be presented to the said Court by the

party who would have been entitled to the rents and profits of the said lands, be applied either in the purchase or redemption of the land-tax, or in or towards the discharge of any debt or other incumbrance affecting the said lands, or affecting other lands standing settled therewith, to the same or the like uses, trusts, intents, and purposes, and in the same manner as the lands which shall be so purchased, taken, or used as aforesaid, or in respect of which &c., stood settled or limited, or such of them as at the time of making such conveyance and settlement shall be existing undetermined or capable of taking effect; and in the meantime and until such purchase can be made, the said money may, by order of the said Court upon application thereto, be invested by the said Accountant-general in his name in the purchase of 3 per cent. Consolidated or 3 per cent. Reduced Bank Annuities, or in Government or real securities, and in the meantime and until such annuities or securities shall be ordered by the said Court to be sold for the purposes afore-

said, or shall be called in or cancelled, the dividends or interest and annual produce thereof shall, from time to time, by order of the said Court, be paid to the party who would, for the time being, have been entitled to the rents and profits of such lands so to be purchased and settled."

42nd sect. "Provided also, that where, by reason of any disability or incapacity of any party entitled to any lands to be taken or used, or in respect of which any compensation or satisfaction shall be payable under the authority of this act, the purchase-money for the same, or the money paid for such compensation or satisfaction shall be required to be paid into the Bank of

England, to be applied in the purchase of other lands to be settled to the like uses, in pursuance of this act; it shall be lawful for the said Court to order the expenses of all such purchases, or so much of such expenses as the Court shall deem reasonable, together with the necessary costs and charges of obtaining such order, to be paid by the said Company out of the monies to be received by virtue of this act, and the said Company shall from time to time pay such sums of money for such purposes as the said Court shall direct."

See also *Ex parte Gardiner*, ante, Vol. 3, p. 117; and *Ex parte Cooke*, and the cases therein cited. Ib. p. 135.

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IN THE HOUSE OF LORDS.

The MONKLAND and KIRKINTILLOCH RAIL-

WAY COMPANY *Appellants.*

v.

WILLIAM DIXON and Others *Respondents.*

May 27.

THIS cause, now heard on appeal, originated in an application made by petition of the Monkland and Kirkintilloch Railway Company (who were incorporated by 5 Geo. 4, c. xlix) to the sheriff of Lanarkshire, for an

Where, by a clause in an act of Parliament, it was enacted, "That nothing herein contained shall be construed to

prevent any owner or occupier of any ground through which the said railway may pass from carrying, at his or their own expense, any railway or other road, or any cut or canal which such owner or occupier is authorized to make in his or her lands or grounds, across the said main railway, within the respective lands or grounds of such owner or occupier:"—*Held*, that the right given by this clause was not confined to the state of the land at the time the act passed, but was intended for the convenience of the occupiers, from time to time, of the land, partly on one side and partly on the other, of the principal railway, and that without reference to the title under which it was held.

Scilicet, no interdict will be granted to prevent a party, having the right to cross a railway, from prolonging and extending it, for the use of any persons with whom he might make an agreement for that purpose.

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interdict against the formation of a railway by the respondents, which would cross the Monkland and Kirkin-tilloch Railway (a).

(a) The sections of the act of 5 Geo. 4, c. xlix, referred to, were as follows:—

The 65th. "That it shall be lawful for the owners and occupiers of the respective lands or grounds through which the said railway shall be made, and his, her, and their servants and workmen, cattle and carriages, at all times to pass and re-pass directly over and across such part of the said railway as shall be made in and upon the said lands or grounds respectively, not damaging or wilfully obstructing the same or the passage thereof, without payment of any toll or tonnage for the same, provided they shall not pass along any other part of the said railway: Provided also, that it shall be lawful for the occupier or occupiers of the respective lands or grounds through which the said railway shall be made, and his, her, and their servants, having authority in writing for all or any such purposes from the said Company of proprietors, or their committee, to ride, lead, or drive any horse, mule, or ass, cow, or other neat cattle, sheep, swine, or any other beast, along the said railway, as far only as the lands in his or her own occupation shall extend, for the purpose of occupying the same lands, such person or persons not damaging or wilfully obstructing the said railway, or the passage thereof."

The 79th. "That, after ten days' notice in writing, given to the proprietors of the said railway, it shall

and may be lawful for any body politic, corporate, or collegiate, or any other owner of any grounds adjoining the said railway, to lay down a branch or branches from his or her lands or grounds to communicate with the said railway, and to make, at his, her, or their own expense, in such manner as shall be agreed upon by and between the proprietors of the said railway and such party or parties; and in case they cannot agree, then, &c., such openings into the ledges or flanches of the said railway, not injuring the same, as may be necessary and convenient for effecting such communication or crossing, without the said Company being entitled to receive tonnage rates for the passing of minerals, goods, or other things along such branch or branches; but without prejudice, nevertheless, to their receiving such tonnage rates for the passing of such minerals, goods, or other things, along the said railway."

The 80th. "That nothing herein contained shall be construed to prevent any owner or occupier of any ground, through which the said railway may pass, from carrying, at his or their own expense, any railway or other road, or any cut or canal which such owner or occupier is authorized to make in his or her lands or grounds, across the said main railway, within the respective lands or grounds of such owner or occupier. Provided always, that no injury or obstruction

The petition was in the following terms:—

“That the petitioners have made and formed, upon the grounds purchased and acquired by them for the purpose, the railway or tram-road fit for the conveyance of coals, ironstone, and other commodities, for the execution of which they were incorporated by the said statute, and powers were thereby conferred upon them; which railway is known by the name of ‘The Monkland and Kirkintilloch Railway,’ in terms of the provision of the said statute: that one part of the said railway extends along or near the north side of the Calder Iron-Works, in the parish of Old Monkland, and there passes through and intersects the grounds of Easter and Wester Garturk, belonging to William Dixon, or to Messrs. W. Dixon & Co. That the petitioners have received notice, that the said W. D., or W. D. & Co., intend to enter upon the petitioners’ grounds and railway, where the same intersect the said lands belonging to them, and to make and form a branch railway across the railway belonging to the petitioners. That the petitioners have good reason to believe, that it is the intention of the said W. D., or W. D. & Co., in making and forming the said branch railway, not to con-

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shall be thereby done or caused to the said main railway; and that, in case any cut or canal shall be made across the said railway, the owner or occupier making the same shall erect and provide, at his or her own expense, such sufficient and commodious bridge or bridges as may be necessary for the said railway.”

The 81st. “That if any person or persons shall make, upon his, her, or their own lands or grounds, any branch or branches running parallel or collateral with the railway hereby authorized to be made, which shall join the said last-men-

tioned railway (otherwise than for crossing the same), it shall be lawful for the said Company of proprietors to demand and take, for every waggon, cart, or other carriage travelling along such branch or branches, on joining and using the said main railway, the same rates of tonnage for the distance travelled by such waggon, cart, or other carriage, upon such parallel or collateral railway, as would have been leviable for such waggon, cart, or other carriage, for travelling the like distance upon the said main railway.”

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fine the same within the said lands or grounds belonging to them, but to extend it to lands lying beyond the same, belonging to the Rt. Hble. Sir W. Alexander or others. That, while the said W. D. and W. D. & Co. are entitled, by the 80th section of the said statute, to carry a railway across the petitioners' railway, *within their respective lands or grounds*, so as to communicate between one part of the same and another, yet they have no right to enter upon the petitioners' property and railway, and to form across the same any railway or other road which is to extend beyond the lands or grounds belonging to them. That, notwithstanding thereof, the object and intention of the said defenders, in proposing to form the said cross railway is, that they may extend the same to lands lying *beyond* those belonging to them, and may thereby convey ironstone and other minerals to their works called the Calder Iron-Works, to the loss and prejudice of the petitioners, by whose railway the said minerals would otherwise be transported, and contrary to the provisions of the statute passed in their favour hereby founded on, and herewith produced. That the said W. D. and W. D. & Co., having declined to give the petitioners any undertaking—that the railway proposed to be executed by them as aforesaid shall not be extended beyond the said grounds belonging to them—the petitioners have no remedy but to apply to your Lordship. May it therefore please, &c., to interdict, prohibit, and discharge the said defenders, jointly and severally, from making and forming any railway or other road across the railway belonging to the petitioners, excepting always, and reserving to the defenders, a right to carry a railway or other road across the petitioners' railways within the said lands or grounds belonging to the defenders, in terms of the provision before referred to; and, in the mean time, to interdict, prohibit, and discharge the defenders from entering upon the petitioners' grounds and railway to the effect of forming any railway or other

road across the same, so as to extend to, or communicate with, any lands or grounds other than those belonging to the defenders as aforesaid."

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An interim interdict was granted in the terms of the prayer of the petition.

A record was made up in the inferior Court, which was subsequently held to be the record in the Court of Session; but, after the record was closed before the Sheriff, that Judge ordered minutes of debate to be presented and revised. Minutes were lodged on the part of the appellants and respondents.

The pleas in law for the appellants were—

1. "The respondents have no right to interfere with the property of the petitioners, except either with their consent, or by statutory authority.

2. "Neither of these is possessed by the respondents for laying any railway across the petitioners' railway in the lands of Garturk, to be extended beyond these lands."

The pleas in law for the respondents were:—

1. "The respondents have, at common law, the undoubted right of forming railways on their own lands, and of extending the same into the lands of such other proprietors as may consent thereto, or of connecting them with such other railways as may be lawfully formed on the lands of such adjoining proprietors.

2. "These rights, which the respondents enjoy at common law, are in no respect diminished, restricted, or taken away by the statute founded on by the petitioners.

3. "The respondents, as owners and occupiers of lands through which the petitioners' railway passes, are expressly declared entitled by that act to carry such private railways across the petitioners' railway, without paying any dues for the use thereof.

4. "Even if the respondents were not entitled to

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carry their proposed railway beyond their own lands, the petitioners have no right to interfere with their proceedings until they shall have transgressed such prescribed limits."

In this process, the following interlocutors were pronounced:—

Hamilton, May
 7, 1838.

"Having considered the minutes of debate, and reconsidered the whole process, finds, That by sect. 80 of the act founded on by the pursuers, owners or occupiers of any ground through which the Kirkintilloch Railroad passes, are entitled to make railroads across it, within the respective lands of such owner or occupier: Finds it admitted that the defenders are proprietors of land at the point where the cross railroad is intended to be made: Finds this proved by lease No. 21 of process, that they are occupiers of the lands of Rochsollock: Finds, therefore, that under the above clause of the act, they are entitled to make the proposed cross railroad, and continue the same to the grounds occupied by them at Rochsollock: therefore recalls the interdict, dismisses this action with expenses, of which allows an account to be given in, and remits the same to the auditor to tax and report, and decerns. (Signed) J. A. VEITCH."

June 28, 1838.

"Having resumed consideration of this process, with the reclaiming petition for the pursuers, and answers thereto, for the reasons assigned in the note below, recalls the interlocutor complained of, declares the interdict perpetual, finds the defenders liable in expenses, of which allows an account to be given in, and remits to the auditor to tax and report, and decerns. (Signed) J. A. VEITCH."

Note.—The Sheriff-substitute is now convinced that he took an erroneous view of the clause of the act upon which the interlocutor now recalled was founded; and he is perfectly satisfied that clause can bear no such interpretation. It has reference solely to the owners or occupiers of land through which the railroad was to pass, and with the very equitable view of preventing the injury of property to a

greater extent than was absolutely necessary for the railroad; and it now appears that the doctrine laid down in the former interlocutor would have the effect of authorizing any individual to cross the pursuers' railroad by another, and continue the same as far as they could obtain a right so to do from neighbouring proprietors, and this might easily be done by a lease, and in this way great damage would be inflicted on the pursuers. The grounds of the above interlocutor are the following:—The only right which the defenders have to cross the railroad in question, the property of the pursuers, flows from the act of Parliament in process. The right there given of crossing said railroad is expressly restricted to railroads made within the lands or grounds of any owner or occupiers of grounds through which it passes. Now, the railroad belonging to the pursuers does not pass through the lands of Rochsollock, and therefore the defenders are not entitled to carry their railroad beyond the limits of the ground belonging to them, and through which the railroad passes, and then continue it to the lands, the occupancy of which has been acquired only lately.

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"Having advised with the Sheriff, who considered the interlocutor appealed from, and reviewed the process, adheres thereto, for the reasons stated in the note to the last interlocutor of the Sheriff-substitute, and dismisses the appeal. (Signed) J. A. VEITCH."

Hamilton, July
 24, 1838.

Note.—The whole question here turns upon the import of the clause which provides, "That nothing contained in the act shall prevent any *owner or occupier* of any ground through which the railway may pass from carrying any railway, or other road, or any cut or canal which such owner or occupier is authorized to make *in his or her lands or grounds*, across the said main railway, *within the respective lands or grounds of such owner or occupier.*" There can be no doubt, that the construc-

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tion which the Sheriff-substitute has latterly put upon this clause is the well-founded one. The power of crossing the main railway by other railways is here expressly limited to the proprietor of the ground through which the first-mentioned railway passes. The power of forcibly compelling the proprietors of the main railway to admit a second across it, is limited to the proprietor of lands, and within their lands, and the Court is not authorized to extend the power to any class of persons, but those specified in the act of Parliament.

These interlocutors having been brought under the review of the Court of Session, the following interlocutor was pronounced:—

“Edinburgh, 22nd January, 1839.

“The Lord Ordinary, in respect the record has been made up in the inferior Court, and has not been objected to in this Court, but held as the record in point of fact, declares the record closed, and appoints parties’ procurators to debate.

(Signed) “F. JEFFREY.”

The judgment of the Sheriff was altered by the following interlocutor of Lord Jeffrey, dated 18th February, 1840:—

First Interlo-
cutor appealed
from.

“The Lord Ordinary, having heard the counsel for the parties on the closed record and whole process, and made *avizandum*, advocates the cause, alters the interlocutors of the Sheriff complained of, and finds, That, according to the true meaning and just construction of the 80th section of the statute in question, nothing more is required than that *the point of crossing* the one railway with the other shall be wholly within the lands of the party by whom the most recent of these railways is constructed, and that *no* limitation or restriction is thereby imposed on the common-law right of the owner or occupier of such lands, to continue or extend the said new railway into any adjoining properties where he may have leave to carry it; and, therefore, recalls the interdict granted by the Sheriff; sustains the

defences against the original action, at the instance of the said Company; assolizies the complainers from the whole conclusions thereof, and decerns: finds expenses due both in this Court and before the Sheriff: allows an account thereof to be given in; and remits to the auditor to tax and to report. 7th March, 1840. (Signed) F. JEFFREY."

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Note.—This is conceived to be the natural and obvious reading of the section as it stands. But when the whole structure and policy of the statute in its context, and all its relative provisions is attended to, it seems to the Lord Ordinary that no other construction can be even plausibly maintained.

By the 65th section, which is the first that bears upon the present question, and is of leading importance as to the construction, the most ample powers are given to the owners and occupiers of lands traversed by the Company's railway to cross it at all points, and at their pleasure, not only by themselves, workmen, and cattle, but expressly "with horses and carriages." The words are, "that it shall be lawful for them and their servants, workmen, cattle, and carriages, at all times, to pass and repass *over and across* the said railway (not damaging or obstructing the same), without payment of any toll or tonnage for such passage," &c. Now, under this section, it is thought to be clear, that the owners or occupiers might carry *any ordinary road* across the railway, at any point within their lands, since they could not well cross it *with carriages* in any other way; and as it would be palpably absurd to suppose that there was anything in this *general permission*, out of which a *prohibition* to exercise their common-law right of forming roads on their own lands could be construed. But, if this be perfectly clear, is there the slightest ground for holding, that the roads so to be carried across the railway at pleasure must necessarily be roads *beginning and terminating within the lands* belonging to the party who makes the crossing?

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There is not a word in this 65th section, at all events, upon which the possibility of such a limitation having been intended can be rested. There is nothing importing a limitation to roads wholly within the same property, or for the mere use or connexion of its several parts. The words, on the contrary, are quite general, "to pass and repass with cattle and carriages over and across the said railway, at all times;" and, of course, as there is no limitation, for all purposes, and, in all respects, as freely as they might have passed over the same space or area before it was occupied by the railway of the Company. If the immediate owner, therefore, had his neighbour's leave to prolong his roads into his property, or if these roads fell at either end, and within his own lands, into public or market roads, it is thought to be sufficiently clear that he might use them for the purpose of such communication, just as freely after he had taken them across the Company's railway under the broad and ample permission now cited, as he might have done before that railway came into existence.

But if this would certainly be true of any ordinary use of passage, or of any metalled or paved road, which the owner might construct for the purpose of such passage, why should it not be true also of any *railroad* which, in the exercise of his unquestionable common-law right and privilege, he might have chosen to make for the same purpose? Or why, it may be asked, was a separate and distinct provision made for the right of crossing by such railroads? These questions, the Lord Ordinary thinks, are most material, and the answers to them seem to him to bring out and lead naturally to the view by which the true construction of the statute in this respect may be best ascertained. He is of opinion that, under the 65th section, the adjacent owners might have made *railways* to cross that of the Company as freely as roads of any other description; and he thinks that this is distinctly recognized and intimated by the subsequent special provision of

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the 80th section, the true object and purpose of which, in his apprehension, was mainly to secure the continuance of that right, and to save it from the risk of being brought into question by any rash or too extensive construction of the section immediately preceding; and, accordingly, it does not purport or profess to confer any *new* or special powers on the adjacent proprietors, but merely to guard against the possibility of their existing and acknowledged powers being narrowed or challenged by a misunderstanding or misconstruction of the preceding enactments, the *proviso* in that 80th section being expressly, "*That nothing herein contained shall be construed to prevent the owners or occupiers of grounds, through which the said railway may pass, from carrying any railway or other road,*" (here classing them together, and bringing both within the benefit of the 65th section), "which he may be authorized to make on his lands, across the said main railway, within the respective lands of such owner or occupier." This of itself seems sufficiently conclusive. But to see clearly the true import and object of the provision, it is necessary to look back to the 79th (a) or immediately *preceding* section, while the general policy of the act as to the rights of adjoining proprietors, and the small extent of monopoly it meant to give to the Company, are conclusively illustrated by the 81st or immediately succeeding section. The whole three, in short, are connected, and ought to be read together, as bringing out the mind of the legislature on the whole subject of discussion.

The 79th gives adjoining proprietors right to lay down branch railways, to communicate with or fall into that of the Company, and that in the amplest and most comprehensive manner, and without subjecting them to any payment or contribution, but only requiring that they shall give previous notice to the Company, and agree with them,

(a) *Antè*, p. 274, n.

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or by referees, as to the nature and construction of the *openings* by which the junction with the main railway is to be effected; and also that they shall pay the regular tonnage duties for the commodities which may be brought by such private branches into the main work.

Then follows the 80th section, already recited, providing substantially, as the Lord Ordinary understands it, that, though duties are thus to be charged upon goods actually coming into and passing for some way on the main railway from private adjacent ways, this shall never be construed as derogating in any degree from the rights conferred by the 65th section, of proprietors *merely crossing* the said railway with carriages on their grounds without any payment of tollage or tonnage whatever, and that whether they cross by private *railways* or roads of any other description.

And then, finally, and to shew how little it was intended to restrain the adjoining proprietors from having private railways, even in situations which might interfere or compete with that of the Company, and to what a very small extent their interests as to such competition are protected, comes the 81st section, by which it is enacted, that if any adjoining proprietors shall make railways on their own grounds, *running parallel* with that of the Company, 'And which shall join the said Company's railway otherwise than for *merely crossing* the same,' then and in that particular case the owners shall be chargeable with tonnage-duties for the space their goods have come on the private railway, previous to falling into the main one, as if they had passed all along on the latter. Now, from this enactment, it is quite plain, 1st, That if proprietors choose to construct railways for their own use, closely adjoining and absolutely parallel to that of the Company, they are at full liberty to use them to any extent, and for all purposes, exactly as if there was no public work in the neighbourhood; provided they never at all join, fall into, or come into actual contact with, that of the Company. And, 2ndly, That if, after running

parallel to that railway for any distance, on one side of it, they choose *merely to cross it*, in order to run parallel to it again on the other side, they are at full liberty to do this also, without payment or contribution of any sort or description. It is conceived, however, to be quite plain, that, in regard to those parallel private railways, by which alone any injurious competition with the Company could be occasioned, there is not a word in the act by which the adjoining proprietors, from one end to the other of the Company's line, could be restrained or precluded from exercising their undoubted common-law right of joining together to make one continued private railway to the whole extent of that line, and accommodating each other with the use of it for their mutual benefit or convenience. By the statute, in short, no monopoly of power to interfere with the ordinary rights of property in their vicinage is conferred on the Company, except singly as to such private railways as, after running for some way *parallel* to theirs, do at last fall into it, and are *not* "merely carried across." With regard to all other such ways as do not at all touch it, or touch it only to cross,—for the two cases are plainly held to be altogether identical,—there is no restraint or limitation whatever, either as to the right to make or to use them, in any number or direction that may be preferred; and exactly as if there had been no public work of the sort in the neighbourhood. It is a cardinal maxim, indeed, and rule of law, that none of the natural and inherent rights of property shall ever be held to be taken away by implication, or without the clear and express enactments of a statute; and if it be undeniable that private railways may be made and used, and continued to any extent, close to that of the Company, and even in the same direction (provided they do not actually touch it), without any right of interference on their part, it seems quite impossible, when all the provisions about *crossing* are considered, to doubt that the same unlimited common-law right extends to such ways as *merely cross* the main line,

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but do not use it in any way as a means of conveyance. There is not only the general permission to cross at pleasure in the 69th section recognized and expressly extended to railways, as a means of crossing in the 80th (a), but in the 81st, where certain burdens are laid on such parallel railways as fall into that of the Company, there is an express exemption of those that only fall into it "merely for crossing the same," which last are thus put precisely on the same footing with those which do not touch it at all; as to which last there can be no question that the adjoining owners, and their neighbours, are under no restraint whatever; but may extend, and connect, and combine their operations as they severally please, or can jointly agree, exactly as if the Company's railway had no existence.

If there was nothing else in the case, indeed, but the apparent want of intelligible *interest* in the Company to insist on such a limitation as they contend for, this alone would be sufficient (where there was the least doubt on the words) to exclude the supposition that it could have been intended to impose such a limitation. Commodities carried on a railway *crossing* (and in this case nearly at right angles) that of the Company plainly could never have gone by that public railway, even if the other had not existed; and being destined for places in a totally different direction, the means or facility of their conveyance to such places must obviously be matter of absolute indifference to that corporation; and, therefore, when we see that they are not in any way protected from the competition of private ways going in the very same direction with theirs, it is certainly the most unlikely of all things, that they should have stipulated for, or the legislature have granted, an interference with the common-law rights of property, to prevent an incomparably slighter, or rather an entirely imaginary interference.

The *whole argument* for the respondents is based upon

(a) Antè, p. 274, n.

the assumption that, being proprietors of the space occupied by their railway, the right to cross it by any party must necessarily be considered as a *servitude merely*; and that as this is given only to the owners of the grounds through which it passes, so it must be considered as given for the exclusive use or benefit to the grounds, which are to be viewed as the *dominant tenement*, and cannot, therefore, be extended or communicated to any adjoining properties in conformity with the decision in the case of Scott and Bogle (*a*).

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There is some ingenuity, certainly, in thus attempting to analyse the right of the complainer into certain technical elements, and insisting on dealing with it as falling exclusively under these denominations. But it is impossible, by any such device, to disguise the fact, that the question is one of a mere statutory *construction*, and must be decided according to what is ultimately held, *told re perspectâ*, to have been the *true meaning and intention* of the legislature. To *that* question, accordingly, the Lord Ordinary has exclusively addressed himself, and has stated the grounds on which he thinks it should be determined. It may be an element, perhaps, in that determination, that the right claimed by the Company is of the nature of, or akin at least to, a right of servitude, and that it may, therefore, be held probable *in dubio* that it was *not intended* to give it, except for the use of a dominant tenement. But beyond this the suggestion and the law of predial servitudes has plainly no operation, and can never exclude the consideration of all the *other* elements by which the true intention may be established. Even looking upon it as the new constitution of a servitude, it appears to the Lord Ordinary that it is not so properly a servitude of *using* a way across the Company's railroad, for the service of the adjoining property, as a servitude of making and repairing a crossing for the continuation of a road to be used for all

(*a*) Fac. Dec. 6th July, 1809.

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legal purposes, and as freely as if there had been no such obstacle to be crossed. The words are merely that the owner "shall not be prevented from carrying any railway or other road across the said main railway within the lands or ground of the said owner or occupier." Not a word being said of *the use* to be made of it, or any reference to the special service or benefit of the said property lands. The fact, that the road so to be carried across is described in the act as a road which the owner must "have been authorized to make on his own grounds," cannot possibly import such a limitation. If it was to be described at all, it could not possibly receive any other description. Being necessary to be carried *across the main railway within his own grounds*, it must necessarily have been within them at both sides of the crossing; and, therefore, no more ample or comprehensive description could have been devised for giving the greatest possible extension to the privilege conferred, than to say that it should apply to all roads (railways or others) which the owner might have constructed, or be entitled to construct, on his own lands. By the words of the act, the road must have been on the grounds of the owner at the crossing; and as it is he alone who is thereby entitled to make the crossing, the only correct description of the road in relation to the matter in contemplation, was that of a road existing on both sides of the crossing within the limits of these grounds. But this can never warrant an inference that it could not lawfully be carried beyond these limits. In truth, however, the Lord Ordinary cannot consider this as a grant of *servitude* at all, and least of all, *servitus itineris ubi prædium servit prædio*. It seems to him, on the contrary, as expressed both in the 65th and 80th sections, and in the *exceptions* of the 81st, to be no more than a mere statutory declaration that the Company's railway *shall be no obstacle* to the continuation of any road, new or old, which exists, or may be legally formed, in a direction to cross that railway; and that the owner of the

lands where the crossing is required may effect such crossing accordingly at any point or points of his own property. There was no thought, it appears to him, of any limitation as to the extent, or use, or connexion of the road so to be carried across; and as there are undoubtedly no such limitations expressed in the act, he certainly sees no ground upon which they should now be inferred, or supplied as by implication.

As the complainer seeks only to extend his railway, for his own individual use, into an adjoining property in which he has a right to the minerals, the Lord Ordinary has limited his findings so as only to justify or affirm his right so to extend it. It may be seen, however, from the preceding observations, that he would be inclined to affirm it to a much greater extent, and to sanction the communication and prolongation of it for the use of any neighbours with whom he might make an agreement, and who might all use it for their joint accommodation,—the statute requiring no more than that the *actual crossing should be made* by the owner of the grounds within which it is effected. But as the decision of the present case requires no such findings, and as there are expressions in the 65th section which might raise a doubt upon the point last mentioned, he would be understood as having formed no judicial opinion beyond what is expressed in the judgment. F. J.

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The preceding interlocutor of Lord Jeffrey having been reclaimed against by the appellants to the second division of the Court, the following interlocutor was pronounced:—

“*Edinburgh, 15th July, 1840.*

“The Lords having heard counsel, continue the cause in the roll for further hearing at next calling.

“D. BOYLE, I. P. D.”

Thereafter the following interlocutor was pronounced:—

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"Edinburgh, 18th July, 1840.

"The Lords having resumed consideration of the cause, and heard counsel for the parties, adhere to the interlocutor of the Lord Ordinary submitted to review, refuse the desire of the reclaiming note, and decern: Find additional expenses due; allow accounts thereof to be given in, and remit the same, when lodged to the auditor to tax and report. Three words delete. J. F.

"D. BOYLE, I. P. D."

The appellants appealed from these interlocutors for the following

REASONS.

- I. Because, the appellants having purchased the ground upon which the railway is formed, any burden or servitude must be strictly construed, and must be looked to with reference to the uses of the original property, part of which was bought and taken for the railway.
- II. Because the privilege founded upon by the respondents is, by express words, limited to the owners and occupiers of ground through which the railway passes, and cannot be extended so as to be a privilege for the use of other lands of which such owner may obtain a lease, but through which the railway is not carried at all.

The respondents supported these interlocutors by the following

REASONS.

- I. Every proprietor has at common law the right of making such roads and ways across the surface of the property belonging to him as he may think fit; and these roads and ways may be extended into the adjoining lands, if he has the leave and permission of the respective proprietors so to extend them.

II. The statute, which authorizes the formation of the Monkland and Kirkintilloch Railway, expressly reserves to the owners and occupiers of these grounds, through which the foresaid line of railway passes, the right of carrying any private line of railway, canal, or road, across the line of the Monkland and Kirkintilloch Railway, provided that the point of crossing lies within the grounds belonging to, or in the occupation of, such proprietor or occupier; and being so crossed, the proprietor or occupier is entitled to extend his road or railway beyond the boundaries of his own property, if he has the right or permission of the adjoining proprietor so to do.

III. The respondents, having the right of property in, and the occupation of, the lands of Garturk, through which the statutory line of railway passes, and being also in the occupation of the adjoining lands of Rochsolloch, are entitled to avail themselves of the right reserved to owners and occupiers of lands by the statute, and to carry the railway projected by them across the said statutory line, at a point within the lands of Garturk.

The appeal was against the interlocutor of the Lord Ordinary and the Court.

Mr. *Pemberton* and Mr. *Kelly*, for the appellants, relied on the 80th and 81st sections, and *Scott v. Bogle* (a).

The *Solicitor-General* and Mr. *Anderson*, for the respondents, were not called upon.

LORD COTTENHAM.—My Lords, I think that the petition of the appellants must be dismissed, because the present complaint is, upon the facts as they appear before us, that the defenders, who have the lands through which the

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(a) Fac. Coll. 397.

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railway originally passed, are now become lessees of the adjoining land; and unless the appellants can make out that the object of this clause was only to protect land held as one estate at the time the original railroad was made, and which was divided by making that railroad, then the appellants' case fails, because what they ask is, that the party may be interdicted from making a railway crossing the main road communicating with the land they now hold of Sir Wm. Alexander. It appears to me that this 80th clause cannot be confined to that estate, which was divided by the railway at the time the railway was made, because it is obviously intended for the convenience of those who may be occupiers, and from time to time occupiers of the land partly on one side and partly on the other side of the principal railway, and that without reference to the title under which it is held; the fact of the occupation of the two sides of the railway being that which entitles the party to the convenience and benefit of crossing it. There is nothing in the 80th section confining it, and the justice of the case requires that it should not be confined. However, the grounds may be stated in the reasons of the learned Judges; we are confined to that which, on facts, is in contest between the parties; and, confining myself to the case as it stands on the facts, I think the party is not entitled to the interdict on the facts he states in his petition, which are the only facts with which we have to deal. Therefore, I move your Lordships that the interlocutor of the Court below be affirmed with costs.

Lord BROUGHAM.—My Lords, I entirely agree with my noble and learned friend. I had some doubts at first whether this section meant the state of the property at the time the act passed or generally; but that doubt is now removed. Certainly, there is one part of it which was not formerly so understood in the making of canals; for, sup-

posing one party to make a canal, and another party to have a right to dig a canal across it, it would be most inconvenient; however, we cannot enter into that.

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LORD CAMPBELL.—My Lords, the only question, it seems to me, is, whether you are to confine the right given by the section to the state of the ground at the time the act passed or not. If you are to confine it to the state of the ground at the time the act passed, then the analogy would arise between the act and the intendment. If you are to read this as owner or occupier, from time to time, of any ground, and at all times thereafter, then the analogy fails; and it being allowed that these parties are the lessees of the adjoining ground, I think that ground is within the meaning of the act of Parliament.

Ordered and adjudged, that the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed, with costs.

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IN THE HOUSE OF LORDS.

June 16.

SIMPSON and Others v. LORD HOWDEN.

An agreement under seal, entered into between the projectors of a Railway Company, S. and others, and Lord H., a peer of Parliament, recited the formation of the Company, and that S. and others were proprietors, and that a bill had been introduced into Parliament for making the railway, the line whereof would pass through the estates, and near the residence of Lord H., who, considering this would be an injury to him, intended to oppose the passing of the bill: and

ERROR, upon a judgment of the Court of Exchequer Chamber, reversing a judgment of the Queen's Bench (a) in an action of debt for £5000.

The pleadings and proceedings, with the arguments and authorities cited in the Courts below, are fully reported *antè*, Vol. I. p. 347, where the Court of Exchequer Chamber reversed the judgment of the Court of Queen's Bench on the second plea.

The present writ of error on that judgment of reversal came on to be argued June 15th, 1842, before Lords *Lyndhurst*, C., *Brougham* and *Campbell*, and in the presence of *Tindal*, C. J., *Patteson*, *Williams*, *Coleridge*, *Wightman*, *Coltman*, and *Cresswell*, Js., and *Parke*, *Alderson*, *Rolfe*, and *Maule*, Bs.

Sir *W. Follett*, Solicitor-General, and *Pemberton* (*J. Addison* with them), for the plaintiffs in error (the defendants below), contended that the agreement entered into by the parties in this case was illegal, and a fraud upon the

that the projectors had proposed to Lord H., if he would withdraw his opposition to the bill, and assent to the railway, they would endeavour to deviate the line proposed. Lord H. agreed that, on condition of the agreements thereafter contained being performed, he would withdraw his opposition, and give his assent to the bill; and they then covenanted, (*inter alia*), in case the bill should be passed in the then next session, to pay to Lord H. £5000, as compensation for the above injury, within six months after the bill should receive the royal assent.

Lord H. accordingly withdrew his opposition, and the bill passed in that session. Six months after, he brought an action of debt for the £5000. The declaration stated the above facts, and it was pleaded that the railway was intended to pass through the lands of other individuals, and that the agreement was entered into secretly between the parties, without the knowledge of those landowners, and was concealed from them and from the legislature until the act passed, and that Lord H. was a peer of the realm and a lord of Parliament:—

Held, (affirming the judgment of the Exchequer Chamber), that the agreement was valid, and that a member of the legislature may make terms for the sale of his land, and compensation for injury to his comforts and property, it not appearing, by the record, that the money was promised as a consideration for his vote, or that the parties meant to conceal it from the landowners or from the legislature, or that any fraud was intended.

(a) *Antè*, Vol. I. p. 347.

legislature and the other landowners on the line of the projected railway, on four grounds.

1. The agreement being for a different line from the then parliamentary line, and being secretly entered into and kept concealed from Parliament, was a fraud on the legislature, and contrary to public policy, and therefore void.

2. That it was a fraud on the other landowners through whose lands the railway, according to the parliamentary line, was intended to pass, who had assented to the undertaking on the faith of that being the line really intended.

3. That it was a fraud upon the other subscribers to the railway mentioned in the bill then before Parliament, without whose privity or consent the agreement was entered into.

4. That it was apparent on the face of the agreement that the £5000 was to be paid in order to induce Lord Howden to withdraw his opposition, and give his assent to the bill then in Parliament; and, he being then a peer of Parliament, the agreement had an evident tendency to influence his judgment and vote in the passing of the bill, and on that ground the agreement was unconstitutional and void.

In addition to the arguments and authorities below (reported, as to the proceedings in Chancery, *antè*, Vol. I. p. 326, and at law, p. 347), they cited *Blakemore v. The Glamorganshire Canal Navigation* (a), and contended that the agreement in question was like the case of fraudulent marriage bonds, and deeds of composition in fraud of some creditors.

Bethell (absente *Kelly*), for the defendant in error (the plaintiff below), contended that no fraud was to be inferred in any case, and that it could not be presumed here, unless apparent on the face of the agreement. There was no intention to deceive, and, the agreement being perfectly legal, there was no obligation on Lord Howden to give

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(a) 6 Myl. & K. 262.

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notice of it, either to the legislature or to the other land-owners. (He was stopped by the House).

THE LORD CHANCELLOR.—We have consulted the learned Judges with respect to the pleadings in this case, and they are unanimously of opinion, that the question of fraud is not raised in any way upon those pleadings. There is no averment upon the face of the plea, that there was any intention, at the time when the agreement was entered into, that it should be kept concealed; and there is nothing upon the face of the agreement itself, or the terms of the agreement, from which we can infer that such was the intention. We are, therefore, of opinion, as far as this question at least is concerned, that the judgment of the Court of Exchequer Chamber must be affirmed.

LORD BROUGHAM.—I entirely agree with my noble and learned friend. I see no fraud whatever alleged in these pleadings.

LORD CAMPBELL.—I also entirely agree in the opinions expressed by my noble and learned friends. It appears to me that the question of fraud is not raised; if it were, I should certainly feel considerable difficulty upon it, after the doubts which have been entertained by persons of the greatest authority upon this subject; at the same time, I must own that I have a very strong opinion that there is nothing in the pleadings shewing that Lord Howden was, by this agreement, positively bound to do any act which would, in the slightest degree, vary the right of any of the parties as they were fixed by the bill which was passed and had received the royal assent. These rights must remain as they were until an application was made for another bill, and until the legislature had passed another bill altering the provisions of the first. It must be presumed that justice would be done to all parties, and the agreement amounts only to this, that there would be an application made to Parliament to vary the first bill. I cannot ap

prehend that any circumstance of that kind could at all render illegal the agreement which the parties entered into; but it is not necessary to give my positive opinion upon that question. I concur in the opinion which has been expressed, and unanimously, by the Queen's Judges, that, when the pleadings are properly understood, it is clear that the judgment of the Court below has been right, and that it must be affirmed.

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Lord BROUGHAM.—When I stated my opinion on the question of fraud, I looked advisedly into the question beyond that which appeared upon the record. I entirely agree with my noble and learned friends, that the question is upon the pleadings; we are disposing of the case upon the pleadings. The point of fraud is not raised upon the second plea, nor does the fraudulent concealment suggested appear on the memorandum of the agreement set forth on the oyer introductory of the pleas: it is upon that ground your Lordships will be called upon to dispose of this writ of error. I would add, however, to that, that I concur in what has fallen from my noble and learned friend, though that is not now the matter for your Lordships' consideration; and I do it advisedly, and upon this ground, that, unhappily, one of the parties to this agreement, Lord Howden, is no more; and I feel that it is just towards his memory that he should have the benefit not of the doubt, but of the expressed opinion which I have formed upon that subject. I move that the judgment be affirmed.

Kelly applied for costs, and interest under the statute (a).

Ordered and adjudged that the judgment of the Court of Exchequer Chamber be affirmed, with costs, and with interest at 4 per cent. on the £5000, from the date of the judgment of the Court of Exchequer Chamber.

(a) 3 & 4 Will. 4, c. 42, s. 30; see *Garland v. Carlisle*, 5 Clark & Fin. 355.

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BEFORE THE VICE-CHANCELLOR OF ENGLAND.

January 2. RANGER v. THE GREAT WESTERN RAILWAY COMPANY
and Others.

THE original bill in this cause was filed by William Ranger, in the month of July, 1838 (a), against The Great

The plaintiff entered into certain contracts with a Railway Company, whereby it was agreed (inter alia) that the engineer of the Company should, every fortnight, ascertain the value of the work done, according to its quantity and relative proportion to the whole works, and that the plaintiff should, on production of the certificate of the engineer, receive £80 per cent. of such value, the remaining £20 per cent. being reserved by the Company until such reserve should amount to £4000. That if the engineer should not be satisfied with the works, the Company should be enabled, after notice given to the contractor, and his default in complying therewith for seven days, to take possession of the works, and thereupon the plant and materials of the contractor, the value of the work done and not paid for, and the reserve fund, should become forfeited to the Company. In the course of the work, the Company advanced several sums of money to the plaintiff, upon the security of an assignment of his plant and machinery upon the works comprised in the contracts, and of the reserve fund. The Company having given the required notice, and, at the expiration of the seven days, having taken possession of the works, plant, and machinery, the plaintiff filed his bill, insisting that the engineer had not so estimated the works as to give to the plaintiff the £80 per cent. to which he was entitled, and that upwards of £30,000 was due to him under the several contracts for works actually completed; insisting also that no forfeiture had been incurred by him; and praying that the Company might elect to permit the plaintiff to complete the works, or otherwise that the contracts might be considered at an end; and praying in either alternative for the taking of accounts between the plaintiff and the Company.

The plaintiff amended his original, and filed two supplemental bills, and thereby stated that masonry, and other works of the most expensive kind, had been paid for at the price of inferior masonry and works, and claimed large sums in respect thereof; and also alleged fraud against the Company, both in respect to the contracts and also in respect to the certificates, and prayed relief therefrom, &c.:—

Held, that, the investigation as to the sufficiency of the payments to the plaintiff must be made in a Court of equity, and cannot be made at law.

That the evidence in support of an allegation of fraud must be very clear, and that it is not sufficient for the contractor to shew that the statements of a Company, with regard to the nature of the work to be contracted for, gave imperfect information, but he must also shew that he could not, with reasonable diligence, have acquired all necessary information.

That clauses contained in contracts, conferring on the engineer any power or authority over the contractor, will not be considered by the Court as fraudulent or void on account of the engineer being a shareholder in the Company, on whose behalf such contracts were entered into.

That the engineer can decide as to the quality of work done, but cannot decide as to the quantity and amount of such work. The question of measurement and calculation will be entertained and decided by a Court of equity.

That where the plaintiff has entered into a subsequent contract with a Company, the Court will not direct inquiries as to the amount of unliquidated damages claimed in respect of antecedent

(a) See Vol. I. p. 1, where the proceedings on demurrer are stated at original bill, instruments, and pro-length.

Western Railway Company and three of the directors of that Company, in their character of mortgagees of certain plant and material used by the plaintiff in the works undertaken by him under three contracts in writing entered into with the said Railway Company.

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This bill, having been once amended, was demurred to, for want of equity, and for multifariousness: but the demurrer was overruled.

The bill was afterwards several times amended; and the last amendment was made in the month of May, 1839, and the answer to that amended bill was put in in November in that year. The time for amending, under the 13th General Order of 1828 and 1831, expired on the 16th March, 1840.

On the 6th March, 1840, the plaintiff filed a supplemental bill.

On the 28th March, in the same year, an order was made for the production of certain papers by the defendant, and the plaintiff was thereby allowed until the last day of Trinity Term to file his replication; he at the same time giving an undertaking not to amend his bill.

grievances, but will consider the new contracts as a condonation, unless, at the time of making them, the plaintiff insisted on his adverse claims—the parties being at liberty to proceed at law.

The Company, by their answer, having stated that the plaintiff was not entitled to a settlement of the accounts until all the works should have been completed:—*Held*, that the plaintiff, having, at the hearing, asked for a settlement of accounts, was entitled, from the admission in the answer, (although the works were completed by the Company, and not by the contractor), to have a final account taken.

That, under the clause of forfeiture, there was no forfeiture of the sums necessary to make up the deficiency in the payments under the certificates of four-fifths of the value of the work done; and the Court directed an inquiry to ascertain whether they were the full sums or not.

Where the evidence as to the nature of masonry is conflicting, a reference will be directed to the Master to inquire, state, and accurately define the sorts of masonry with respect to which the question arises.

That stipulations as to penalties in contracts for railway works are binding on the contractor.

Where no fraud can be shewn, no relief will be granted against a forfeiture provided for by a clause in the contract.

Where it had been agreed that the provisions of a written contract should in all respects, as far as applicable, apply to an unwritten contract:—*Held*, that stipulations as to forfeiture contained in the written contract should extend to and form part of the unwritten contract:—

Scemle the Court will draw a distinction between a supplemental bill adducing facts which had happened prior to the filing the original bill in support of the case made by that bill, and a supplemental bill adducing facts which happened prior to the original bill, but not put in issue by such original bill; but that the objection to such supplemental bill should be taken by demurrer, or by an application to take the bill off the file, and could not be properly taken at the hearing.

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The replication in the original suit was filed on the 16th June, 1840, and in the supplemental suit on the 9th January, 1841.

In the month of September, 1841, the plaintiff filed a second supplemental bill stating that, until the production of the papers and documents directed in the first suit, the plaintiff was not aware that the Company had been in the habit of making all the payments which they had made on account, as if the works done had been of an ordinary description; but that, upon examining, and not until then, the certificates and other papers which had been produced, it appeared that masonry and other works of the most expensive kind had been required and approved of by the agents of the Company, but that plaintiff had been paid as for works of an ordinary description. He claimed large sums as due to him in respect of those particular works.

On the 8rd December, 1841, an agreement was entered into and signed by the solicitors of both parties, that further time should be given to the defendants for putting in their answer to the second supplemental bill, and that the plaintiff might proceed in the examination of his witnesses in the original and first supplemental suit, and that the evidence taken in those suits might be read in the three causes or any of them.

The defendants by their answer took an objection to the last supplemental bill upon the ground of irregularity, and thereby claimed the benefit of the objection.

The three causes now came on for hearing, and the preliminary objection was first argued.

Sir *W. Follett*, Solicitor-General, Mr. *Stuart*, and Mr. *Stevens*, for the Company, in support of the objection, cited *Colclough v. Evans (a)*, *Crompton v. Wombwell (b)*,

(a) 4 Sim. 76.

(b) 4 Sim. 628.

Attorney-General v. Fishmongers' Company (a), *Wray v. Hutchinson* (b), *Milligan v. Mitchell* (c).

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Sir *T. Wilde*, Mr. *Wakefield*, and Mr. *Twells*, for the plaintiff, were not called on.

THE VICE-CHANCELLOR.—I shall not trouble the counsel for the plaintiff upon this point, for it appears to me to be a very plain matter. In the first place, in *Wray v. Hutchinson*, what was attempted to be done was this,—to put in issue, by way of supporting the original cause, facts which had happened after the original bill was filed; and I apprehend that, unless the defendant has so conducted himself as to deprive himself of making the objection to the admission of such evidence, he may fairly make the objection. The plaintiff is not at liberty at the hearing to give evidence of any facts, except those which happened prior to the filing of the original bill. This is a very different case. In that case, the objection was made by the answer, and being made, the Master of the Rolls sustained it, and, I think, quite rightly. Now, observe what this case is: it is attempted by the plaintiff, as I understand it, to put in issue, by his second supplemental bill, facts which occurred before the original bill was filed. He did, by the production of the books and papers in the original cause, discover certain evidence which went to corroborate the general case which he might have against the Company, upon facts existing before the original bill was filed. If the original bill should turn out not to have put these facts in issue at all, that would be a different kind of thing—that would apply to the hearing of the evidence: but the question now before me is, whether I am, at the hearing, at once to say that the supplemental bill ought to be treated

(a) 4 My. & Cr. 1.

(b) 2 My. & Keen, 235.

(c) 1 My. & Cr. 433.

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as a nullity. I apprehend, that, if the supplemental bill was filed at a time when, by the course of the Court, according to the true construction of the orders and the habit of dealing with them, it ought not to have been filed, the course for the defendants to take was, if the objection appeared on the face of the bill, to have made the objection by demurrer; and if the objection did not arise on the face of the bill, I think they ought to have applied to the Court to have the supplemental bill taken off the file. Now, they do not demur—I do not know whether they could demur or not—in fact, they do not demur, nor do they make an application to take the bill off the file; I myself never knew that the Court, when the cause has been allowed to come on to the hearing of a supplemental bill, would refuse to entertain that supplemental bill, which only seeks to give in evidence facts which existed antecedently to the filing of the original bill. But it was said, because we might have made an objection to the supplemental bill at a given time and in a given manner, therefore we should now be at liberty to make it at the hearing. I think the objection to that would be, that there might be a complete answer given to the very objection, if the objection had been made in the shape of a motion to take the bill off the file; because, in that case, it would be competent to the plaintiff to have shewn conduct on the part of the defendants, which would have prevented them from taking the objection; instead of which, they wait till the hearing, when it is impossible for the plaintiffs to read any affidavits in support of his case, and then, for the first time, they make the objection. I think the making it in the answer is perfectly immaterial. They do answer, and they make the objection; but I apprehend it is not the proper mode of making the objection, and therefore my opinion is, irrespective of this paper of 3rd December, 1841, and what has taken place in the cause, that I am at liberty to attend to the statement of these facts which are

contained in the second supplemental bill. In *Milligan v. Mitchell* there was a special order given for leave to amend by adding parties, and under cover of that the plaintiffs filed a bill and stated a new case; when the Court saw that the plaintiffs were in effect playing falsely with the Court, and under pretext of an order which only gave leave to amend by adding parties, were making a new case; the Court, on being informed of that, treated the order as a nullity. It appears to me that this is quite a different case, I never recollect this sort of objection brought forward at the hearing. *Wray v. Hutchinson* is quite a different case: because the Court cannot hear evidence, except of facts, which are put in issue by the original bill, that is, the facts which happened antecedently to the original bill. I entirely approve of *Wray v. Hutchinson*, and with that approval I mean to say, that I am now at liberty to hear the second supplemental bill.

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This preliminary objection having been disposed of, the cause was opened on the merits (a).

Sir *T. Wilde*, for the plaintiff.—Although a contractor may submit to terms of a Company by executing a contract entered into with them, yet in order to enforce those terms, such contract must be based on good faith and fair dealing, and the Court always watches that extraordinary powers be not made available for the purpose of abuse and oppression. In many cases the contractor is misled by the engineer, who makes his plans without sufficient information, and who endeavours to fasten upon the contractor the result of his own errors and mistakes. The evidence shews that, when advertisements were issued for tenders for contracts, plans were prepared denoting where trial pits had been sunk, and such pits were left open, and the

(a) The material parts of the and evidence are stated in the amended and supplemental bills judgment.

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earth taken from them was placed beside them. The contractor was referred to those plans and to those pits to ascertain the cost and time. The strata where these trial pits were opened consisted of shale or light earth, dun stone, which crumbles when exposed to the air, and pennant stone, which is as hard as granite. The pits were not in this case sunk to the level of the railway, and there was no indication of hard stone at the mouth of the pits. The contractor made his calculations of cost with reference to those appearances, that is, at 75 per cent. less than he would have made them if he had supposed the excavations were to be made through pennant stone.

Although one of the clauses throws the responsibility of ascertaining the nature of the soil on the contractor, yet it does not permit the Company to mislead the contractor; *Dowson v. Pickering (a)*. Nay, the principle of law, independently of equity, goes further than that; for it is the law, that, if you know a man to have fallen into error, though you may not have been the author of that error, yet if you know that he has been contracting with you under an erroneous impression, it is a fraud in you not to correct his error, and you cannot take the benefit of it. Another part of the plaintiff's case is, that, by repeated alterations in the engineer's own plans, and by repeated delays both in giving orders for work and in allotting land for the deposit of earth, the contractor was unable to prosecute his work according to his own course and within the stipulated time. Although the contractor had no right to withstand the orders of the Company, yet he has a just right to say what is the effect of those orders on the contract.

It was also stipulated that 80 per cent. on the work done should be advanced every fortnight to the contractor, but the certificates on which these payments were to be made were irregularly given, so as to compel the contractor to get

(a) 4 Taunt. 779.

into advance £100,000 on these contracts. The certificates and admeasurements are fraudulent and deficient in every respect. The notices given to the plaintiff as to the dissatisfaction of the Company were general, and avoided any specific charge. The taking possession was not for the purpose of expediting the works, but with a view to working a forfeiture, which is proved, by the Company taking twenty-seven months to do that which the plaintiff had engaged to do in seven.

When penalties or forfeiture are to be incurred, the construction is strict. The legislature, when it thinks fit to impose penalties or forfeiture, must do it in express terms; intendments are not sufficient. The language of the clause imposing the penalty of forfeiture is the rule of construction, and if the language do not meet the case, Courts of justice will not impose a penalty, although the implied intention be, that the penalty follow the particular offence.

If the contract be, that on a given event, a forfeiture shall be incurred in favour of a person who shall have the power of determining the time of such forfeiture, the Court will narrowly inquire into the conduct of the parties before it will enforce so anomalous a condition.

The terms of the contract are, that the contractor should proceed in the works to the satisfaction of the Company; but this satisfaction cannot give a power of exercising a wanton, capricious, and wicked denial and repudiation of satisfaction; but if it do give this power, then there is greater reason for a Court of equity to provide against its importing a forfeiture into such a power. The default which is to give rise to the forfeiture is not a default in giving satisfaction, but in not commencing and regularly proceeding: it is only during the seven days after the notice given that the forfeiture is to attach. There is not a tittle of evidence to shew that there was cause for dissatisfaction during those seven days.

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The only object of the penalty of forfeiture is for indemnity, and if the Company are indemnified for the expense incurred in doing that which the contractor engaged to do, that is all they can equitably recover. There will be no difficulty by action at law in determining the amount of damages.

There is no pretence for the forfeiture of the plant and materials in 1 B. extension, and as to the other three parts of the case, they are under mortgage: these last are not in a condition to be forfeited. The Company have, by their own acts, that is, by the deed of mortgage, taken them out of the contract and removed them from the application of the clause of forfeiture. The Company have, on their part, broken the contracts; they have not paid the sums stipulated to be paid, and have given certificates not agreeing with the measurement-book which they now produce. That money which was covenanted to be paid every fortnight was never intended to be forfeited, and the Company must now come to an account with the contractor for those sums which he ought, under the terms of the contract, to have received every fortnight.

Where harsh and stringent powers are reserved, there most especially will a Court of equity require the extreme of good faith; but here, the engineer, who was to stand between the Company and the contractor, is not only not free and independent, but is, in fact, or lately was, and may be now, for anything to the contrary contained in his answer, a large proprietor and shareholder; but all this is kept from the contractor, and the act of Parliament does not profess to disclose the name of Mr. Brunel in the list of proprietors soliciting the bill, but he is presented and examined as a witness only, being, in fact, at that time a proprietor of from fifty to one hundred shares, and he cannot now exercise the powers given to him as a judge under the concealment of the real character which belonged to him:—the certificates given by such a judge can never be considered by the Court as binding against the contractor. Another

point in which the Company have departed from the contract is, that they have contracted for common rubble, coursed rubble, and ashlar masonry, and have in many instances, where common rubble was covenanted for, insisted on ashlar masonry (which required eight times the labour, and was six times more expensive than the other), and had allowed only the price of common rubble to the contractor.

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Mr. Wakefield (on the same side) cited *Hill v. Gray* (a), and contended that the contractor was labouring under deception, delusion, or misapprehension at the time he made the tender, from the very ground of the smallness of the sum tendered; and on the authority of *Pasley v. Freeman* (b), *Dobell v. Stevens* (c), *Steward v. Coesvelt* (d), and *Lomi v. Tucker* (e), a contract could not be enforced where such deception, delusion, or misapprehension was caused by, or not removed by, the party with whom he was contracting. The doctrine of a Court of equity is not forfeiture, but compensation; *Page v. Broom* (f), *Geddes v. Wallace* (g). A departure from the terms of a contract and acquiescence, such as there has been in this case, must be taken as a tacit adoption by all parties of a new course of dealing; *Const v. Harris* (h). Nor is it necessary that such an agreement should be in writing; *Beatson v. Nicholson* (i). As to the terms in the contract "or proceed in the said works to the satisfaction of the Company," this cannot mean an arbitrary, capricious power, but a power to be executed honestly and fairly; and this Court will declare whether the Company are right in expressing their dissatisfaction, bearing in mind the deviations from

(a) 1 Star. 434.

(b) 3 Term Rep. 51.

(c) 3 B. & Cr. 623.

(d) 1 Car. & Payne, 23.

(e) 4 Id. 15.

(f) 4 Russ. 6; 2 Russ. & My.

214.

(g) 2 Bligh, 294-5.

(h) Russ. & Tur. 523, 527.

(i) 6 Jurist, 620.

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the centre line, the enlargement of the tunnels, the widening of the shafts, the difference of the strata, and the suspension of the works and different orders given by the engineer for his own particular purposes; *Dallman v. King* (a). A Company having such a power of seizure as is here contended for, must exercise that power within the time mentioned in the notice; and they may not, by deferring the seizure, induce the contractor to bring more materials and more plant on the ground in order to augment the forfeiture; but, in this case, the notice on contract 1 & 2 B. expired on the 30th June, and on 8 L. on the 4th of August, and the seizures were made subsequently to those periods. Another question arises, whether the right to give the notice must not have reference to some certain time of completion, and if the Company have, by the delays they have interposed, allowed the time to pass by, the right to give the notice is gone also, and they have discharged the contractor from the penalties. The engineers have made several alterations in the original plans—by widening the shafts—making a deviation in the line of the tunnel, &c. They had the power of determining what time was to be allowed for these alterations, but, as they fixed no time, the time fixed by the contract did not apply: *Holme v. Guppy* (b). The party claiming the forfeiture must bring his case within the letter of the clause. The Court is disinclined to extend forfeiture. According to old law, persons who were debtors, and who could not be held to bail, were in a penal action admitted to bail; *Turner v. Warren* (c). If a penal action be brought, and a verdict found for the defendant against evidence, no new trial will be granted. But, if a person be indicted for a misdemeanor and found guilty, he may have a new trial; but if acquitted, there can be no new trial. So, likewise, in the

(a) 4 Bing. N. C. 105.

(b) 3 Mee. & W. 387.

(c) 2 Strange, 1079.

case of gaming, if a person lose more than £10 at one sitting, the *qui tam* informer gets certain penalties; but if that sitting be interrupted by dinner, it is considered as one sitting, in an action brought by the loser, but as two sittings as regards the *qui tam* informer; *Bones v. Booth* (a), shewing that the Court in penal cases inclines to the side of the person who would incur the penalty.

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Mr. *Twells* (on the same side).—With regard to the deception practised on the plaintiff, cited the cases, *Walker v. Symonds* (b), *Turner v. Harvey* (c), *Edwards v. M'Leary* (d), *Sibbald v. Hill* (e). If it be made an excuse on the other side, that the information acquired before the passing of the act, and stated by Mr. Brunel in his evidence before the Houses of Lords and Commons, was forgotten at the date of the contract, still the case remains the same as if the deception or concealment were wilful. *Burrows v. Locke* (f). The Company had no right to stand by and see the plaintiff spending his money, and afterwards seize on his works and effects without compensation; *W—— v. N——* (g), *E. I. Company v. Vincent* (h), *Legal v. Miller* (i), *Stanhope v. Toppe* (j), *Morphett v. Jones* (k), *Cawdor v. Lewis* (l), *Parrott v. Palmer* (m). With respect to the engineer's withholding the certificates, he cited *Worsley v. Wood*, and *Moser v. The Churchwardens, &c. of St. Magnus* (n). A Court of equity will relieve against almost all penalties; *Rose v. Rose* (o), *Saunders v. Pope* (p).

Sir *W. Follett*, Solicitor-General, for the defendants.—

- (a) 2 W. Bl. 1226.
- (b) 3 Swan. 2.
- (c) Jac. 169.
- (d) Coop. Rep. 312.
- (e) 2 Dow. p. 263.
- (f) 10 Ves. 476.
- (g) 5 Vin. Abr. 522, No. 38.
- (h) 2 Atk. 82.

- (i) 2 Ves. 299.
- (j) 1 Bro. Pa. Ca. 157.
- (k) 1 Swan. 172, 1 Wils. 100.
- (l) 1 Y. & Coll. 427.
- (m) 3 My. & K. 640.
- (n) 6 Term Rep. 710.
- (o) Amb. 332.
- (p) 12 Ves. 285.

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If it be true that the contractor in this case is entitled to a *quantum meruit*, if he be entitled to recover a certain sum of money, why does he not bring his action?

There is nothing in the circumstances of this case which could induce the Court to say that the two contracting parties had not full power to enter into any contract or stipulation they thought fit,—they were strangers with full and public notice entering into a contract, and agreeing between themselves by what stipulations they would be bound. Nothing has been done in this case by the Company which is not distinctly and pointedly provided for by the terms of the contract; and it cannot be conceived how a person, who must be well acquainted with all these stipulations, and who is a contractor by profession, can come to this Court to be relieved from a contract entered into as this has been.

Several decisions of the Courts of law have proceeded on the ground that those parties who enter into these contracts must be bound by every condition contained in them. If they stipulate for a certificate,—if they stipulate for satisfaction,—they are not entitled to recover any price, or any money for the work done, unless they perform the condition of producing the certificate of satisfaction. No doubt could be entertained in a Court of law, that, on a stipulation of a contract of this sort, the contractor would not be entitled to maintain his action to recover the price of work done, unless he had complied with the condition of the contract, requiring the production of the certificate of the party on which he was entitled to be paid; *Morgan v. Birnie* (a), *Bradley v. Milnes* (b), *Vickers v. Cock* (c). And then, because the contractor could not have maintained his action at law, is he permitted to file his bill in equity? Can he wipe the condition out of the contract, and go on with this suit as a

(a) 9 Bing. 672.

(b) 1 Bing. N. C. 644.

(c) 3 Dowl. 492.

common action on a *quantum meruit* for work done? Additional expense and delays were provided for by the contract; and it was in the power of the engineer to give compensation or extension in time, if the plaintiff had claimed and had been, in the judgment of the engineer, entitled to receive either; but no application was made for compensation or extension of time, although that is now made the chief substance of this bill in equity. It is impossible that the contractor can have been deceived about the strata through which the railway was to pass. The open quarries and the river banks shew the existence of hard stone. It is not probable that the engineer and directors would endeavour to keep that secret which the engineer had himself given in evidence before the Houses of Lords and Commons. With respect to the signing of the contract, the contractor was put on his guard by the terms of the 82nd clause of the contract (a). If the contractor was deceived at all, he must have been so deceived by those whom he himself employed; he could not have been led into error by the depths of the trial pits, if the person whom he employed to survey the line had had the commonest acquaintance with the principles of geology, or had taken the smallest trouble to acquire information; besides which, it is particularly provided by the contract that the stone to be taken out of the tunnels was to be employed in building certain bridges, and the only stone which could be so used, of that taken out, was pennant stone;

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(a) 82nd clause, "The drawings are to be considered as giving the general forms and character of the works, but all dimensions given in the specification are to be taken in preference to dimensions written on the drawings, and written dimensions on the drawings in preference to dimensions by scale. The contractor must satisfy himself of the nature of the soil, of the general

forms of the surface of the ground, of the quantity of materials required for forming the embankment, and all matters which can in any way influence his contract, and no information upon any such matters derived from the drawings or specifications, or from the engineer or his assistants, will in any way relieve the contractor from all risks."

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and never at any time did the plaintiff complain, either to the Company or his creditors, that he had been deceived in the nature of the strata through which he had to work.

The certificates do not agree with the scheduled prices, because the work, on the completion of which the scheduled prices became payable, were never completed to the satisfaction of the engineer, and it was an accommodation to the contractor to pay in proportion to the work done, and no complaint was ever made by the contractor on this head, although the measurements taken by the officers of the Company were well known and checked by some one acting on the part of the plaintiff. As to the ashlar masonry, the plaintiff was well aware of what he had contracted to build; he built up a specimen wall under the direction of Mr. Babbage, and he well knew everything that was done, and at what rate the masonry was to be paid and charged, and he cannot now come in and pray that all the benefit which this Company had under the contract should be set aside, and that he may have his action to recover what he now considers due to him. It is impossible that the contractor could suppose that the Company was largely indebted to him, and at the same time he should be making applications for advances and receiving loans and assigning over his plant, and debts due from government, for securing those advances and loans.

With regard to the forfeiture, it may be assumed, on the evidence first read (the letters between plaintiff and defendants and their agents), that there can be no shadow of doubt that the plaintiff was not proceeding with the works, not only not according to the satisfaction of the engineer, but also not according to his contract, and that there could at that time have been no hope that he could perform his contract according to its stipulations. In all these acts of Parliament, the legislature imposes a limit on the time within which the works are to be completed; it is, therefore, essential to the Company that the contract should be complied with in respect to the time; and also, the

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opening of the railway between two large towns at a certain time was of essential importance to the undertaking. A Court of equity will not relieve, except in those cases where it can plainly see it can make compensation to the party against whom it relieves. If the Court think that a clause of forfeiture has been introduced for the purpose of securing the doing of a certain act, or the payment of a certain sum of money, it will relieve because they can order the act to be done, or the money to be paid; such is the case of landlord and tenant with a covenant for re-entry, in case of rent in arrear. But if the landlord enter into a stipulation that the tenant shall pursue a particular course of husbandry, or use particular parts of a farm in a particular way, or if in any case the Court does not at once see it can make compensation (as in the case of insurance and repairs), it will not relieve against forfeiture; *Reynolds v. Pitt* (a), *Hill v. Barclay* (b), *Wadman v. Calcraft* (c), *Saunders v. Pope* (d). No compensation can be given to the Company if you relieve against this forfeiture, because if they did not take possession of the works, most probably the time would have expired within which their act permitted them to do the work at all. The forfeiture is not for securing the performance of a covenant, but for giving the Company power to take the work into their own hands, and therefore the principle of relief against forfeiture cannot be applied to this case. Where time is of the essence of a contract, no relief will be given; *Sparks v. The Liverpool Waterworks Company* (e), *Green v. Bridges* (f). Nor will the Court relieve because the covenant appears a hard one at law; *Hesketh v. Gray* (g).

(a) 19 Ves. 134; 2 Pri. 212,
 note.

(b) 16 Ves. 402, 18 Ves. 56.

(c) 10 Ves. 67.

(d) 12 Ves. 282.

(e) 13 Ves. 428.

(f) 4 Sim. 96.

(g) 1 Amb. 268; 6 Term Rep.
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As to the alterations directed by the Company, they are all met and provided for by the 34th clause of the contract (a).

The mortgages cannot in any manner affect this case: one of them contains a trust to sell, with a distinct provision that it shall not affect the provisions of the contract, and the other gives a further charge with the same distinct provision. As regards the construction of these contracts, the rules of a Court of law and a Court of equity are the same. Where this Court is satisfied that the contract is harsh, arbitrary, and oppressive, it may be induced by circumstances to relieve. If parties did not stand on equal terms, or advantage is taken of a particular situation, or if the policy of the law be against the validity of the contract, then a Court of equity will relieve, although the contract may be binding at law; but where there is no position of that sort between the parties,—where they are wholly strangers to one another,—where the contract is entered into by public competition and advertisements,—and where no particular inducements are held out to the

(a) 34th clause. "If the said W. R. shall be prevented from or materially impeded or delayed in the proceeding with, or the completion of, any of the works which under this contract ought to be performed and executed by the said W. R., by means or in consequence of any act which may, contrary to the true intent and meaning of these presents, be done or omitted to be done by the said Company, or any authorized engineer or agent on their behalf, such prevention, impediment, or delay, shall not vacate these presents, or otherwise affect the same, except that in every such case, and in no other case, the

principal engineer for the time being of the said Company shall determine whether any, and, if any, what extension of time ought to be allowed for the execution and completion of all or any of the works hereby contracted for; and whether any, and, if any, what compensation or allowance ought to be paid or allowed to the said William Ranger in respect of such prevention, impediment, or delay, and in what manner such compensation or allowance ought to be paid or allowed, and the determination of such principal engineer for the time being shall be binding."

contractor, if he be a person capable of managing his own affairs, this Court will not vacate the contract.

A Court of Equity will never look upon a contract as waste paper which has been acted upon for two and a half years.

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Mr. *Stuart* (on the same side).—If there be no fraud with regard to the execution of the contract, or in carrying into effect the stipulations it contains, then it is impossible that this Court will exercise a jurisdiction of account, and it has never been held that this Court has such a jurisdiction. When a doubt has existed whether a builder has been under or overpaid, this Court will not direct an ad-measurement of the work done, nor enter into the detail of the specific execution of the contract before the Master. It will not entertain jurisdiction on any contract which involves in itself questions of compensation or of damage, if, therefore, it now determine to have these accounts taken, it will be, in fact, deciding *ex post facto* what in the outset it refuses to entertain at all. If it refuse to direct a specific performance of the contract on the ground of inconvenience, it must, on the same ground, refuse a reference to the Master to take the accounts.

An account cannot be directed where the items on one side are all unliquidated, and in the nature of a *quantum meruit* or damages, and, on the other side, payments on account.

The certificates are so many settled accounts, which this Court will not open. The plaintiff admits he could not have relief at law; much less, then, has he a right to relief in equity; for it is one of the essential doctrines of equity, that where you have an agreement, in order to authorize the Court to look at it at all, it must be such an agreement as you can recover damages upon.

If the plaintiff were deceived in the strata, he should have stopped when he came to the hard stone, thrown up

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the contract, and said he was deceived. He cannot do it here; he has no equity founded on his own negligence, nor any founded on his agent's imperfect information.

As to Mr. Brunel being an interested person, there is no concealment of that on the part of the Company. The contract shews that he was not merely a shareholder, but represented all the shareholders by being their paid agent and engineer.

The Company stand on the contract. They have agreed on the faith of that contract and have rejected other tenders; and they insist on the regularity of the forfeiture which the plaintiff has, by his failing to carry out the terms of the contract, incurred.

Mr. *Stevens*, (on the same side).—The Company is composed of an immense number of persons who have become shareholders on the faith of the deed, which declares that three directors may enter into contracts on behalf of the Company, and these contracts shall bind the Company. The Court must look, and the shareholders have a right to look, on these contracts as the measure of the Company's rights and liabilities. The lowness of the contract is no argument against the Company, for it is often a matter of speculation on the part of the contractor to make a low contract and put high scheduled prices on extra work, expecting to derive his remuneration from the latter source.

The Court will relieve in some cases against penalties, but when they are in the nature of stipulated penalties, it will not relieve. The alteration of the original plans can afford no excuse for the non-completion of the works, as it is sufficiently proved that much more time has been granted than any alteration of the works could have rendered necessary.

Sir *T. Wilde* replied.

THE VICE-CHANCELLOR.—The judgment upon the hearing must proceed upon the same grounds as those on which the Lord Chancellor decided the demurrer, as reported in 1 Railw. Cas. pp. 55 and 56. That demurrer, as I collect from the papers before me, was filed to the original bill after it had received one amendment under an order of the 30th July, 1838. The bill of revivor and supplement erroneously speaks of it as if it was only five times amended; but the five orders for amendment, mentioned in the bill of revivor and supplement, were all of them dated subsequently to the order of the 30th July, 1838. Under those five orders the first amended bill has been altered in many particulars, but the general case made by the first amended bill seems to me, on comparison of it with the general case made by the subsequently amended bill, and the evidence, to be substantially the same; so that the late Lord Chancellor's decision upon demurrer must now be adopted at the hearing, and the questions which he pointed out as questions to be decided on the hearing must now be decided. It may, upon investigation, turn out to be the fact, that the plaintiff has been, if not overpaid, at least fully paid, as the defendants state in their first answer; but there is no proof of this; and the Lord Chancellor has decided that the investigation necessary to determine this fact can only take place under the superintendence of a Court of equity, and cannot be made in a Court of law. There must, therefore, be a decree for an account; and the next step is, to determine what directions must accompany that decree, and how the rest of the plaintiff's case is to be disposed of. The works undertaken by the plaintiff were under the three contracts, 1 B., 2 B., and 8 L., dated respectively the 19th March, 9th May, and 30th August, 1836, and the unwritten contract, 1 B. extension. After the contract 8 L. had been executed, a deviation was made from the original line, and works were done on the new line without a new contract in writing, but with more or less

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reference to the contract 8 L. In the month of April, 1838, the Company rightly or wrongly took possession of part of the works on 1 B., and on the 2nd July, 1838, of such parts of the works in 2 B. as were then in the possession of the plaintiff, and also of the works in 1 B. extension and 2 B.

About the 11th April, 1838, the Company took possession of the cuttings and works at Ruscombe Hill included in 8 L., and in August of the same year, of the remainder of the works on the Reading line.

The original bill prayed an injunction in respect of the possession taken by the Company of the works in 1 B., 2 B., and 1 B. extension, but the injunction was refused. No injunction was at any time even prayed for as to the possession by the Company of the works on the Reading line. With respect to the contract 1 B., the plaintiff prays by his amended bill "that it may be declared that he was imposed upon, deceived, and defrauded in respect of the strata through which the tunnels and cuttings in the contract 1 B. were to be made, and is entitled to be relieved in regard thereto and from the contract sum of 63,028*l.* 16*s.*, as well as from the prices scheduled to such contract, so far as regards such strata; and is entitled to be paid for the works done by him on the portion of the railway, the subject of the contract 1 B., so far as regards such strata, according to fair prices for the same, and that the like declaration may be made in regard to the extra work done upon such portion of the railway." If the plaintiff alleges fraud, he must prove it.

In the specification to the contract 1 B., under the head "Tunnels," there is this passage:—"The sides of the tunnels, which are supposed to be sandstone, must be neatly hammered and dressed; any hollow formed of careless working must be filled up with rubble masonry well bonded into the natural rock." Under the head "General Description," there is this passage:—"The stone for the construc-

tion of the Avon bridge and other masonry must be obtained from the tunnels and cutting to the eastward of the tunnel No. 1." Under the head "Masonry," there is this passage :—"All the masonry will be constructed with the materials upon the line:" and under the head "General Stipulations," there is this :—"The contractor must satisfy himself of the nature of the soil." So that the specification put the contractor upon his guard, and did not make any representation that the stone was soft; but by its requisitions as to the bridge and masonry, implied that the stone was hard enough for a bridge at least; and represented, as a supposition, that the sides of the tunnel were sandstone. The whole sentence, taken together, evidently shewed that the sandstone was supposed to be hard rock, which would not require masonry, unless where a hollow had been made by careless working. It is clearly proved by Mr. Brunel, Mr. Frere, and Mr. Babbage, that pennant stone is sandstone, and the hardest description of sandstone, and the only sandstone in the neighbourhood of Bristol of sufficient hardness to be used for bridges or any strong masonry, and that Hanham stone is pennant stone raised at Hanham. The Company, by their answer to the amended bill, expressly assert that sandstone varies very much in its degree of hardness, and that pennant stone is sandstone. The point is, therefore, expressly put in issue and distinctly proved by three scientific men. The seven miners examined for the plaintiff do not disprove or deny it. The amended bill shews that the plaintiff said, in June, 1836, that he had been misled or deceived as to the strata by the person whom he had employed to look over the ground before he made his tender for contract 1 B. That most probably is the case. It appears from the evidence given by Mr. Brunel before the House of Commons in 1834, contrasted with that given by him in 1835 before the Lords, that he did not know in 1834 what he knew in 1835.

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In 1835, he knew there was hard sandstone used for building bridges. In 1834, he had not bored, though he had in some degree examined. It appears, from the evidence, that Lloyd could satisfy himself by inspection of the soil thrown up, or by any other means he might think it right to use in order to obtain a correct knowledge of the nature of the soil and strata; and that the Company and their engineers were always ready to facilitate this investigation. From the evidence given by Lloyd, it seems he made a mistake in supposing that the pits were sunk to the level of the railway. Whether they were so or not, might have been ascertained at once by measurement, and most probably, he and the miners were mistaken in the meaning of the word sandstone. But mistakes made by Mr. Lloyd are no evidence of fraud having been practised by the Company; and it is remarkable, that, after June, 1836, when the hard nature of the stone had been discovered, the plaintiff went on with the contract 1 B.; for he and Mr. Brunel agreed to the stipulations contained in the paper of the 20th July, 1836, which expressly refers to the hard Hanham stone as contradistinguished from red sandstone. The charge of fraud appears to me to be an afterthought,—there is no evidence to support it; and so far as the bill sets up a case of fraud, and asks relief in respect of fraud, it must be dismissed with costs. The amended bill next prays—"That it may be declared that all clauses contained in the contracts 1 B., 2 B., and 8 L., conferring any power, authority, or discretion on or to I. K. Brunel, or on or to the principal engineer of the Company, so long as Mr. Brunel has been or may be the principal engineer of the Company, are fraudulent and void as against the plaintiff, and may be cancelled; and that it may be declared that the plaintiff ought not to be in any way concluded or affected by any decisions, valuations, or certificates of Mr. Brunel, in regard to the matters aforesaid, or any of them." It seems to me that no such large declara-

tion ought to be made, either generally in respect of the contracts themselves, or in respect of the fact that Mr. Brunel was a shareholder from the commencement of 1836 to the middle of March, 1842. It is of the utmost importance to the safety of mankind that railways should be well constructed, and the public can have no security that they are well constructed without the judgment of some eminently scientific man. The Great Western Railway Act (a) recognises this principle. By sections 70, 71, 72, and 73, it provides that certain works affecting the Metropolis roads shall be done by the Company, under the superintendence and according to the judgment and by the consent of the surveyor-general to the commissioners of the Metropolis roads. Sections 74 and 75 provide that certain works affecting the London and Birmingham Railway, shall be done under the direction and superintendence of the engineer of that Company. And, by the 191st section, the judgment of the engineer or agent of the Company is decisive as to the unfitness of any engine. The legislature takes it for granted, that the surveyor-general and the engineers will be eminently scientific men; and therefore, in matters of opinion, makes their judgment final. The objection, that Mr. Brunel held shares, is not, in my opinion, of any weight; for, if the plaintiff had really thought it deserving of notice, he might have objected before he executed the contracts. It is notorious, that, in Companies like the Great Western Railway Company, the engineers and other officers are shareholders, and the plaintiff might easily have ascertained the fact. The character of the engineer is of more value to him than his interest as a shareholder, and the Company which had selected him would, of course, have insisted on retaining him; in every question, therefore, as to whether the work has been properly done

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or not, it appears to me that the plaintiff is bound by the opinion of Mr. Brunel: but this is totally different from the question of fact, what quantity of work has been done, and what payments ought to have been made for it? When the Lord Chancellor, in his judgment (a), says, "The amount only to be ascertained by a minute examination of the works done, and of the mode in which the payments have been from time to time made by the engineer," he evidently supposes that a question may be raised as to the amount of works, and the quantity of payment is upon the dry matter of measurement and calculation; and that, if a question is fairly raised whether the measurements and calculations made by Mr. Brunel are right, that question must be decided in this Court.

It is next prayed, "That, in taking possession by the Company of the cuttings and works at Ruscombe, a fraudulent or undue advantage was taken of the plaintiff; and that, in regard to such cuttings and works, the plaintiff ought, from the time when the Company took possession thereof, to be relieved or discharged from all liability; and in case it shall appear that the plaintiff has signed any paper, entry, or book, in regard thereto, that the same may be declared fraudulent and void, and may be cancelled." As to this, no case was made at the bar, and in fact no case could be made, for it appears from the evidence that the plaintiff voluntarily accepted the Company's proposal that they should take possession, and since the Company took possession, they have not sought to make the plaintiff liable in respect of those cuttings and works. In that respect, therefore, the bill must be dismissed with costs.

The amended bill next prays, "That it may be declared that the signature of the plaintiff to the paper writing of the 18th April, 1838, was obtained by fraud, or that frau-

(a) *Ante* Vol. I. p. 55.

dulent or undue advantage was taken of the plaintiff in obtaining the plaintiff's signature thereto, and that such paper writing may be declared fraudulent, and may be cancelled, and that in taking possession by the Company of the earth-work and tunnels in the portion of the railway, the subject of the contract 1 B., except the open cutting at the east mouth of the tunnel No. 3, a fraudulent or undue advantage was taken of the plaintiff, and that in regard to such earth-work and tunnels, the plaintiff ought, from the time the said Company took possession thereof, to be relieved or discharged from all liability." There is no evidence given by the plaintiff to shew that there was any fraud used in obtaining his signature to that paper, or that any fraudulent or undue advantage was taken of him by the Company in relation to it; on the contrary, it is proved that the arrangement proposed by the paper was highly beneficial to the plaintiff,—that he readily acceded to it,—that he took a day to consider before he signed it,—and upon the arrangement being concluded, expressed to Mr. Frere his satisfaction at it, and said it was a very beneficial one for him. And it appears from the paper of the 29th May, 1838, that though a heavy loss had been sustained by the plaintiff in respect of the contract 1 B., or rather the losing part of it, yet the tunnel had been taken off his hands by the Company on terms which he considered would save him from further loss, and that the other two contracts were advantageous. That paper, as I understand it, contains resolutions of the plaintiff's creditors founded on statements and explanations made by the plaintiff. This case of fraud, therefore, is not only not proved but disproved; and the bill, as to all that regards the proposal of the 18th of April, 1838, and what was done under it, must be dismissed with costs. At the hearing, it was insisted that, in respect of several petty grievances, inquiries ought to be directed, in order that the plaintiff might have compensation

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from the Company in the nature of unliquidated damages. Some of those grievances are so frivolous that the statement is useless: as, for instance, the story about Lyne's injunction; as if the Company could be made responsible for an injunction obtained against them *ex parte* on grounds so untenable that it was dissolved six days afterwards. This was not insisted upon at the bar, and most properly. Of the others insisted upon, first, a complaint was made in respect of certain shafts. Mr. Lloyd and Mr. Buckwell say, the shafts were begun twelve feet in diameter, because that size was required and specified by the contract, which is an unfair method of stating it, for contract 1 B. says—"These shafts are to be twelve feet in diameter at the least," which is a very different thing. As to various matters that took place from the 25th March, 1836, to the end of 1837, short answers are given by Mr. Frere and Mr. Babbage, and, as far as they go, I am inclined to believe them rather than the plaintiff's witnesses. The next complaint was in respect of the headings of tunnels, which is mixed up with a complaint about the want of what Lloyd calls sufficient spoil land, and a complaint about what Mr. Bucknell calls contradictory orders and want of earlier instructions. These matters began in March, 1836, and went on for some months in that year. Very little answer is given by the Company's witnesses to these matters. The next subject of complaint was in respect of slopes, ditches, and retaining-walls. This appears to have begun in April, 1836, and to have continued to 3rd April, 1838. The next subject of complaint was, an alleged deviation from the centre line, that had been laid down in carelessness and ignorance. Exhibits were read relating to this matter, the last of which was dated the 25th January, 1838. Mr. Frere and Mr. Babbage assert that the centre line was correctly laid down, and lay the blame on the erroneous manner in which the heading of Tunnel No. 3 was made. The next was the enlargement

of tunnels. Then followed the complaints as to the Company's delay in selecting stone, the removal of stone, and consequent deficiency of stone; and also complaints in respect of the Avon bridge. With respect to all these subjects of complaint, a vast deal of evidence has been given by the plaintiff and but little by the defendants; and, as to some of them, no evidence at all. The material thing is the time when they took place. I do not mean to deny, that in respect of some of them, questions as to compensation might not fairly have been raised, as, for instance, Mr. Frere's letter to the plaintiff of 27th December, 1837, admits mistakes, and, for aught I know, the plaintiff might have recovered or may recover damages at law. But it is insisted upon by the plaintiff's counsel, that as to these matters this Court ought to direct inquiries, for the purpose of determining the amount of compensation due to the plaintiff. My opinion, however, is, that no such inquiries ought to be directed, not merely because the claim for unliquidated damages is more properly examinable in a Court of law, but principally, because after all these grounds of complaint had taken place, the arrangement respecting the cuttings at Ruscombe Hill was made, and the Company's proposal of the 18th April, 1838, was accepted by the plaintiff. If the plaintiff had ever meant to claim compensation from the Company in respect of antecedent grievances, he should have claimed it before these arrangements were completed. They may justly be considered as a condonation, and equity will not allow the plaintiff to receive a benefit, without at the time insisting upon or noticing his adverse claims, and afterwards to turn round and prefer them. The plaintiff, after his letter of the 5th July, 1836, to Mr. Brunel, was continually asking favours up to the 18th May, 1838, and did not allege that he was injured till he wrote the letter to Saunders of the 25th May, 1838. The case on the bill is an af-

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ter-thought. It is impossible now to put the plaintiff and the Company in the situation in which they were prior to the 11th April, 1838, and therefore, as to all the petty grievances noticed in the pleadings, I think that the plaintiff's bills should be dismissed with costs, which dismissal will not affect the plaintiff's right to recover damages in a Court of law as to all or any of those matters. The Company say they have not withheld from the plaintiff any money to which he was entitled, there not having been, and not being now, any sum of money due and payable from them to the plaintiff and remaining unpaid; they deny that £40,000, or any other sum, was due to the plaintiff on the 23rd March, 1837, and they say, that all the work which at that date had been done by the plaintiff under the contracts, had been duly and regularly certified; and they deny, "that if a just account were taken of the works done by the plaintiff on the Reading line, and of the payments made by the Company on account thereof, it would be found, or that it is the fact, that there is now a large or any balance due to the plaintiff in respect of such last-mentioned works." There is a general statement as to the certificates given by Mr. Brunel and the mode of making them. It seemed to me, upon the hearing, that objections were made to some of the certificates, which were not fully met on the part of the Company; and though a good reason was assigned why they were not fully answered, viz., that they were not sufficiently detailed and specified in the supplemental bill to enable the Company to meet them; yet I think enough appeared to shew that, if the plaintiff asks for it, there must be an account. Moreover, the Company, by their answer to the bill of revivor and supplement, say, "that when they took possession of the said works," that is, the works on the Reading line, "the plaintiff was not, in fact, entitled to receive any sum of money whatsoever from the

Company, inasmuch as the plaintiff, upon the balance of account between him and the Company, was largely indebted to them. It is not pretended that there ever has been any settlement of accounts. The Company say they have not declined to come to any settlement of accounts with the plaintiff; no application to that effect having been made by the plaintiff, and that the plaintiff was not and is not entitled to any such settlement of accounts until all the works shall have been completed. All the works have now been completed, although not by the plaintiff: and the plaintiff at the hearing asks for a settlement of accounts. It appears to me, therefore, that according to the defendant's own view, a final account must now be taken. With respect to the mode of taking the account, this is to be observed. When the case was before the late Lord Chancellor, the bill, as then amended, set forth a clause as to forfeiture of monies in case of the Company taking possession upon the contractor's default, which in 1 B. is clause 20, in 2 B. clause 22, and in 8 L. clause 19, and his Lordship held (a) that, under that clause, if previously to taking possession, payments had not been made of the four-fifths of the value of the work done, but the certificates had been short of that value, there would be no forfeiture of the sums necessary to make up that deficiency. That amended bill stated, that the provisions in contract 2 B. & 8 L. were, for the most part, similar to those in contract 1 B., and his Lordship held the same thing as to 1 B. extension. The defendants say, that the contract 1 B., and the specification thereof, expressly provided for the execution by the plaintiff of a portion of such last-mentioned works, consisting of the carriage of materials excavated under the contract 1 B., into an embankment to be formed beyond the canal feeder; that a portion of work was done by the

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plaintiff for which he was paid as extra work, and it was a matter of question, between Mr. Brunel and the plaintiff, whether the plaintiff was not bound to execute the whole of such extension work, as extra work under the contract 1 B., but that ultimately, in November, 1837, it had been arranged that the whole of such extension works remaining to be executed should be done according to a schedule of prices—meaning schedule C. All this is in effect proved by Mr. Brunel, who also stated that it was agreed between the plaintiff and Mr. Brunel that the provisions of the contract 1 B. should apply to the extension in all respects as far as applicable, except as to the prices, and that the works on 1 B. extension were measured and certified in the same manner as the works under contract 1 B., and payments were made in respect thereof in like manner as in respect of works under such last-mentioned contract. The defendants, in their answers to the amended bill, speak of a schedule of prices, a copy of which is marked C.; but I do not find that paper among the exhibits or admissions. As I understand Mr. Brunel's answer to the 8th and 9th interrogatories, the paper C. was in effect the plaintiff's exhibit 110, with alterations made by Mr. Brunel, and then copied by Mr. Frere. An inquiry, therefore, must be made whether the sums paid according to the certificates under contracts 1 B., 2 B., and 8 L., were the full sums that ought to have been paid according to those contracts; and whether the sums paid for the 1 B. extension works prior to November, 1837, were the full sums according to the scheduled prices in 1 B. contract, and afterwards according to the prices in paper C. And if the sums paid on 1 B. extension, and on the three contracts 1 B., 2 B., and 8 L., were not the full sums that ought to have been paid, so as to leave anything due to the plaintiff, then, having regard to the sums of money advanced to the plaintiff by the Company, on security of the indentures of the 23rd March and 31st

August, 1837, and the memorandum of the 18th November, 1837, whether anything and what is due from the plaintiff to the Company, and from the Company to the plaintiff, and whether at the times respectively, when the sums advanced by the Company and secured by those indentures and memorandums, or any other sums, were advanced, any and what sum of money was due from the Company to the plaintiff; and if it shall be found that any sum was then so due, then such sum must be wholly or in part set off against the sum advanced by the Company, as the case may be. Connected with this account is the question as to ashlar, in respect of which the defendants have not given any evidence in chief, and no evidence is given by any one of their witnesses on cross-examination, except Mr. Brunel. In the supplemental bill definitions are given of common rubble, coursed rubble, and ashlar, which are denied by the answer to it. It is superfluous almost to say that I know nothing of the matter, but I have made inquiries of the scientific as well as the mere working man, and am not certain that the plaintiff's definitions are not correct. I shall, therefore, refer it to the Master to inquire and state and accurately define what is common rubble, what is coursed rubble, and what is ashlar; and in taking the accounts above directed, to inquire and ascertain whether any and what quantity of coursed rubble was paid for as if it had been common rubble, and whether any and what quantity of ashlar was paid for as if it had been common or coursed rubble, and whether any thing and what is due to the plaintiff in respect of such underpayment, if any. And in taking these accounts, the Master is to allow interest at five per cent. upon any monies due, and is to have regard to the mode and time of payment prescribed by the contract, and the right of the Company to deduct penalties. I see no reason why the stipulations as to penalties should not bind the plaintiff:

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such stipulations are common in all such contracts as 1 B., 2 B., and 8 L., and are common, because, as I have learnt from great authority, engineers know that without them they would have no power over contractors. That the plaintiff thought that the system of penalties was wholesome and efficacious is evident from this: two of his witnesses, Lloyd and Buckwell, swear that the shafts were commenced as task-work by miners and quarrymen, under agreements to do certain quantities of work every fortnight under penalties for non-performance, which evidence is given, as I understand, for the purpose of shewing the plaintiff's desire to fulfil his contract with the Company. For all purposes of this suit, the works upon the line of deviation from the original line in contract 8 L. must be considered in the same manner as if they were upon the original line.

The defendants, by their answer, say, the deviation was determined after the contract 8 L. had been executed. Mr. Brunel says, the deviation was determined upon before the contract 8 L. was entered into. He probably means that he himself had resolved upon it, if it could be effected; at all events, the plaintiff was put in possession of the new ground before the passing of the act authorizing the deviation, that is, the 1 Vict. c. xci, which passed the 3rd July, 1837, for the plaintiff commenced the works on the new line on the 10th November, 1836. Whether the deviation was authorized by the contract or not, is immaterial, for Mr. Brunel proves that it was agreed between him and the plaintiff, that the contract 8 L. was to be applied, as far as it could be made applicable, to the works on the new line. By the 5 & 6 Will. 4, c. cvii, s. 249, the railway was to be completed within seven years from the 31st August, 1835. It was absolutely necessary, therefore, that the contract should stipulate the time within which the contractor should perform the works. Contract 1 B.,

dated the 19th March, 1837, stipulated that the work should be completed within twenty months of its date, that is, by the 19th November, 1837, (taking months to mean calendar months); and it also stipulated that certain parts should be done within shorter times specified. Contract 2 B. stipulated that the works were to be completed within twenty months from the time the plaintiff should have notice to commence the same. He had notice to commence on the 18th May, 1836, therefore the works in 2 B. were to be completed on the 18th January, 1838. Contract 8 L. stipulated that the works should be completed within nineteen months from the time the plaintiff should have notice to commence the same, and that certain parts should be completed within shorter times specified. Formal notice to commence the works was not given till the 7th or 8th November, 1836, so that the works were to be completed by the 7th or 8th June, 1838. Mr. Brunel says, "Before the 1st July, 1836, I had felt, and had frequently, and in almost every communication that I had with the plaintiff, expressed to him my dissatisfaction at the slow progress of the works under the contracts 1 B. and 2 B." He also says the plaintiff failed in executing the works under the contract 1 B. within the periods stipulated in the said agreement. The plaintiff's own language in his letter to Owen, of the 19th January, 1837, is, "the lingering works." On the 20th October, 1837, at a meeting after the plaintiff had received a notice requiring him to proceed regularly with the works, the plaintiff inquired of Mr. Brunel with what particular parts of the works he was dissatisfied. Mr. B. said it was difficult to point out any part in particular, inasmuch as the whole was in arrear, and there was a total want of arrangement throughout the entire works. The same delay is shewn in April, 1838, as to 1 B. and 2 B., and on the 23rd June, 1838, as to 1 B., 2 B., and 1 B. extension. Mr. Brunel, by his answer to the interrogatories,

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states, that the plaintiff did not, subsequently to the date of the notice of the 23rd June, 1838, proceed with the works of 1 B. extension regularly, or to Mr. Brunel's satisfaction, or with as much diligence or expedition as the plaintiff ought. That the excessive delay arose only from the plaintiff's own negligence and want of arrangement. He also says, "It was, in my judgment, quite necessary that they should be taken out of the plaintiff's hands, in order to ensure their completion." All this is confirmed as to the works near Bristol by Mr. Frere and Mr. Babbage: They state that the delay was continually increasing. Without repeating what has been said by the late Lord Chancellor and myself upon this point, I am of opinion that this Court ought not to interfere with the possession which the Company has taken of the works, and the tools and materials thereon (*a*), which words, as I understand them in contracts 1 B., 2 B., and 8 L., comprehend everything on the works at the time when possession was taken, and upon the evidence of Mr. Brunel already mentioned, for the purpose of forfeiture, 1 B. extension must be considered as part of 1 B., and the substituted line in 8 L. as the original line. On the part of the Company, the taking possession was a necessary matter of self-defence against the increasing slowness and delay of the plaintiff, and I cannot see the least appearance of fraud in the matter. In the amended bill, the plaintiff is pleased to talk of the oppressive terms of the contracts. His own conduct refutes the accusation. He entered into the contracts voluntarily. If the first was found oppressive, how happened it that, nearly two months afterwards, he entered into the second, and more than three months after that, into the third? The plaintiff's tender for contract 2 B. was not the lowest; yet the Company accepted it. Was that oppressive? It

(*a*) *Antè* Vol. I. p. 6.

appears, that, besides tendering for 2 B., the plaintiff made a separate tender for contract 3 B. ; and at the same time he also made a joint tender for contracts 2 B. and 3 B. On the 24th April, 1837, the plaintiff was desirous to take the contract 1 B. This appetite for contracts with the Company is utterly inconsistent with the notion which the plaintiff puts forward that he had been ill-used by them ; and the joint tender shews, that if the separate contract prices for contracts 2 B. and 3 B., amounting together to £129,059, were fair, the plaintiff was willing to give up more than £3000 rather than not encumber himself with two additional contracts, one of them at least being substantially in the same terms as the first under which the plaintiff had acted for several weeks ; and Mr. Frere's letter to Parr, of the 6th of May, 1836, gave notice that the specification in 2 B. would be strictly enforced. The evidence shews that the Company accepted Mr. M'Intosh's tender for contract 3 B. at £60,290, a sum less by £14,000 and upwards than the sum tendered by the plaintiff. The Company might have thought the plaintiff's tender unfair, or that he could not execute both contracts, or they might have entertained both opinions. But though he must have known that this opinion was, in May, against him, in August, 1836, the plaintiff tendered for contract 8 L., and took more than usual pains to obtain it ; for it appears from Mr. Brunel's answers to the 6th and 7th interrogatories, that, before the plaintiff was allowed to take the contract 8 L., he had a conversation with Mr. Brunel, in which the plaintiff represented himself as being fully competent, in a pecuniary point of view, to carry on the works in it, and said that his affairs were satisfactory ; and that though he was occasionally pressed for money, it was only a temporary pressure. Perhaps the plaintiff deceived himself : at any rate Mr. Brunel was misled, and the result was, that the plaintiff took the contract 8 L., which he thought beneficial, and in

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that respect he was not oppressed, but kindly treated, by the Company; and the result upon the whole is, that, except as to the account, including the inquiries in respect of ashlar, the bills must be dismissed with costs, and the plaintiff then without any express leave of the Court will be at liberty to proceed at law, as he may be advised, in respect of any of the other subjects of complaint. Before I finally leave the subject, I must express regret that the plaintiff has, with reference to Mr. Brunel, Mr. Frere, and Mr. Babbage, used the language that is found in his pleadings. For instance, in the amended bill, the expressions "fraudulent, insufficient certificates" occur twice. Mistakes may have caused insufficiency, but no proof has been given, as I presume, because none could be given, that Mr. Brunel made them fraudulently. The plaintiff also states by his amended bill that Mr. Frere was a young man of limited experience, and that Mr. Babbage was a young man of scarcely any experience; but the plaintiff's letters to Mr. Frere (in which he speaks of his "valuable information") in August, 1836, and June, 1837, shew the opinion the plaintiff then expressed of Mr. Frere, and refute the supposition of his incapacity. Mr. Babbage states that he is employed by the Company under the direction of Mr. Brunel and Mr. Frere. In the first amended bill, it is stated that the Company had lately discharged Mr. Babbage from his situation of assistant engineer on the express ground of his being incompetent to the office. Mr. Babbage, by his evidence, as far as it goes, disproves that altogether; no proof has been given of it; the allegation has been abandoned, and the fact that Mr. Babbage is still thought by Mr. Brunel fit to be employed as an assistant, abundantly proves him to be valuable as a rising engineer and man of science, and not unworthy of the name which he bears.

With respect to the accounts and inquiries directed by

the decree, all costs and further directions must be reserved; and if counsel wish to speak to the minutes, I will hear them at some future day.

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The minutes, as drawn up by the Registrar, were as follows:—

DECLARE, that for the general purposes of this decree, the portion of the railway in the pleadings mentioned, and therein described as 1 B. extension, must be considered as included in the contract 1 B. in the pleadings mentioned, and the line of the said railway substituted for the line in the contract 8 L. in the pleadings mentioned, must be considered as included in the contract 8 L. Refer it to the Master to inquire and state to the court whether the sums paid by the defendants, the Great Western Railway Company, according to the certificates in the pleadings mentioned, under contracts 1 B., 2 B., and 8 L., therein also mentioned, were the full sums that ought to have been paid according to those contracts; and whether the sums paid for the 1 B. extension works prior to the month of November, 1837, were the full sums according to the scheduled prices in 1 B. contract, and afterwards according to the prices in paper C., in the pleadings mentioned; and if the sums paid on 1 B. extension, and on the three contracts 1 B., 2 B., and 8 L., were not the full sums that ought to have been paid, having regard to the sums of money advanced to the plaintiff by the Company, on security of the Indentures of the 23rd day of March, and the 31st day of August, 1837, and the memorandum of the 18th day of November, 1837, in the pleadings respectively mentioned, or otherwise advanced by the said company; and the said Master is to inquire whether any thing and what is due from the plaintiff to the Company; or from the Company to the plaintiff, and whether at the times respectively, when the sums advanced by the Company, and secured by these Indentures and memorandum, or any other sums were advanced, any and what sums of money were due from the Company to the plaintiff, and the said Master is to take an account of such sums; and if it shall be found that any sum was so due, then such sum is to be wholly or in part set-off against the sums advanced by the Company, as the case may be, and refer it to the said Master, to inquire and accurately define, and state to the court, what is common rubble, what is coursed rubble, and what is ashlar; and in taking the aforesaid accounts, he is to inquire and ascertain whether any and what quantity of coursed rubble was paid for as if it had been common rubble, and whether any and what quantity of ashlar was paid for as if it had been com-

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mon or coursed rubble, and whether any thing and what is due to the plaintiff in respect of such under payment, if any; and in taking the accounts, the Master is to allow interest at 5 per cent. upon any money due, and is to have regard to the mode and time of payment prescribed by the contracts, and the right of the Company to deduct certain penalties; and for the better taking the said accounts, and making the aforesaid inquiries, the parties are to produce before the said master, on oath, all deeds, books, papers, and writings, in their custody, possession, or power, relating thereto, and are to be examined upon interrogatories, as the said Master shall direct, who, in taking the said accounts, is to make unto the parties all just allowances, and except as to the accounts and inquiries hereby directed, let the plaintiff's bill stand dismissed out of this court, with costs to be taxed by the taxing master of this court, in rotation, and let such costs, when taxed, be paid by the plaintiff to the defendants, and let the defendants, the Company, permit the plaintiff, his solicitors and agents, upon reasonable notice, and at all proper times, and in a proper manner, to survey and inspect the line of railway, and the works thereon included in the contracts 1 B., 2 B., and 8 L., and the line of railway described as 1 B. extension, and the Reading line, and reserve the consideration of all further directions, and of the subsequent costs of these suits, until after the said Master shall have made his report, and any of the parties are to be at liberty to apply to this court, as they may be advised.

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COURT OF CHANCERY.

V. C. KNIGHT BRUCE.

ATTORNEY-GENERAL v. THE EASTERN COUNTIES RAILWAY COMPANY. 27th July.

AN information filed by the Attorney-General, at the relation of the clerk of the trustees of Rochford Hundred, and the adjoining roads, against the Eastern Counties Railway Company, stated the act of Parliament, incorporating that Company, (6 & 7 Will. 4, c. cvi.) (a), and, also, that

An information was filed at the relation of the trustees of a turnpike-road against a Railway Company, in order to compel them to remove a temporary bridge, which had been erected for the purpose of conveying spoil earth over the road, or to compel them to set out a new road:—*Held*, on motion to dissolve an injunction granted *ex parte*, that the operation of the injunction should, on certain terms, be suspended for seven weeks, or until further order, no case of practical inconvenience having been made out, although there had been a clear infraction of the law.

(a) The sections of the Eastern Counties Railway Act, set out in the information, and referred to in the argument, were as follows:—

Sect. 9. "That, for the purposes, and subject to the provisions and restrictions, of this act, it shall be lawful for the said Company, their agents and workmen, and all other persons by them authorized, and they are hereby empowered, to enter into and upon the lands of any person or corporation whatsoever, and to survey and take levels of the same, or of any part thereof, and to set out and appropriate for the purposes of this act such parts thereof as they are by this act

empowered to take or use; and in or upon such lands, or any lands adjoining thereto, to bore, dig out, embank, and sough, and to remove or lay, and also to use, work, or manufacture, any earth, stone, trees, gravel, or sand, or any other materials or things which may be dug or obtained therein, or otherwise, in the execution of any of the powers of this act, and which may be proper or necessary for making, maintaining, altering, repairing, or using the said railway, and other works by this act authorized, or which may obstruct the making, maintaining, altering, repairing, or using the same respectively, according to the

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the Eastern Counties Railway Company proposed to carry their railway across the turnpike-road leading from Shar-

full and true intent and meaning of this act; and also to make and construct upon, across, over, or under the railway or other works, or any lands, hills, vallies, streets, roads, railroads, or tramroads, rivers, canals, brooks, streams, or other waters, such inclined planes, tunnels, embankments, aqueducts, bridges, whether temporary or permanent, roads, ways, passages, conduits, drains, piers, arches, and fences; and also to erect and construct such houses, wharfs, warehouses, toll-houses, landing-places, engines, and other buildings, machinery, and other conveniences and works of all descriptions, as the Company shall think proper; and also to alter the course of any rivers, canals, brooks, streams, or water-courses, for such time as may be judged necessary by the Company for constructing or maintaining any of the works aforesaid; and also to divert or alter the course of any rivers or streams of water, roads or ways, or to raise or lower any such rivers or streams, roads or ways, in order the more conveniently to carry the same over, or under, or by the side of the railway, and to make drains or conduits into, through, or under any lands adjoining or near to the railway, except houses or buildings, for the purpose of conveying water from or to the railway; and also, from time to time, to alter, repair, or discontinue the before-mentioned works, or any of them, and to substitute others in their stead and generally to do and execute all other matters and things neces-

sary or convenient for constructing, maintaining, altering or repairing, and using the railway and other works by this act authorized, the said Company, their agents and workmen, doing as little damage as may be in the execution of the several powers hereby to them granted, and the Company making full satisfaction in manner hereinafter mentioned to all persons and corporations interested in any lands which shall be taken, used, or injured, for all damages by them sustained in or by reason of the execution of all or any of the powers hereby granted; and this act shall be sufficient to indemnify the Company and all other persons for what they or any of them shall do by virtue of the powers hereby granted, subject, nevertheless, to such provisions and restrictions as are hereinafter mentioned and contained." &c.

Sect. 97. "That, where the railway shall cross any turnpike-road or public highway, either such turnpike-road or public highway shall be carried over the railway, or the railway shall be carried over such turnpike-road or public highway, at the expense of the said Company, by means of a bridge, where not otherwise provided for by this act, of such construction as is hereinafter mentioned, unless two justices of the county wherein such public highway shall be situate shall, by writing under their hands, allow that such public highway may be crossed on a level."

Sect. 100. "That, where any

field to Rochford, and that, by arrangement with the trustees of the road, they had caused a new line of road to be made, and the old one to be stopped up.

bridge shall be erected by the said Company for the purpose of carrying the said railway over or across any turnpike-road, the span of the arch of such bridge shall be formed, and shall at all times be and be continued, of such width as to leave a clear and open space under every arch of not less than twenty-five feet, and of a height from the surface of such turnpike-road to the centre of such arch of not less than sixteen feet, and the descent under any such bridge shall not exceed one foot in thirty feet." &c.

Sect. 102. "That, in all cases where, in exercise of the powers hereby granted, any part of any carriage or horse-road, railway or tramroad, either public or private, shall be found necessary to be gone across, cut through, raised, sunk, taken, or so much injured as to be impassable for travellers, passengers, or carriages, or the persons entitled to the use thereof, the Company shall, at their own expense, before any such road shall be so gone across, cut through, raised, sunk, taken, or injured, as aforesaid, cause a good and sufficient road (as the case may require) to be set out and made instead of such road so gone across, cut through, raised, sunk, taken, or injured; and such new road shall be as convenient for passengers and carriages as the said road so gone across, cut through, raised, sunk, taken, or injured as aforesaid, or as nearly so as may be; and shall cause such new road to be put into

good and substantial order and condition when the former road cannot be more easily restored; and, when the road so gone across, cut through, raised, sunk, or passed over, shall be a turnpike-road, the substituted road, if temporary, shall be so made, and the principal road restored within six calendar months after the commencement of such operation; and the railway, where it shall cross such turnpike-road, shall be made and kept in repair, so as to prevent inconvenience or obstruction to the passage along such turnpike-road; and, in case the said Company shall not, in manner aforesaid, cause a good and sufficient road to be set out and made, before any such road shall be so injured or prejudiced, as aforesaid, or in case any turnpike-road shall not be restored within six calendar months after the commencement of the operation hereinbefore mentioned, then, and in either of such cases, the said Company shall forfeit and pay, for each and every day during which such good and sufficient road shall be neglected to be made as hereinbefore directed, or during which such turnpike-road shall not be restored after the expiration of said six calendar months, the sum of £20, which penalty shall be recoverable from the said Company in such and the same manner as any other penalties incurred by the said Company, for which no special provision is made by this act," &c.

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That the Company intended, and were proceeding, to make an arch, or bridge, or viaduct over the new line of road, for the purpose of removing an embankment on one side of that road to the other side, for some purpose connected with their railway; and that they had then recently placed or erected upon both sides of the new line of road, close to the line of their railway, certain scaffolding and timbers, which were in part placed and erected upon, and formed an embankment on each side of the said new line of road.

That the Company had not caused any road whatever to be set out or made, instead of the new line of road so proposed to be crossed by their arch, bridge, or viaduct. That the width of the road had been very considerably reduced by the scaffolding and timbers so placed and erected by the Company, and that such scaffolding and timbers formed a serious obstruction in the said new line of road, and that, by reason of the same having been so narrowed, the road had become much less convenient for travellers and carriages, and that the part where the scaffolding and timbers had been placed had, by means thereof, become very inconvenient and inconvenient, and that several horses had been much frightened by the works and timber, and thereby risk and peril had been caused to travellers. That the Company intended to carry and convey waggons, and earth, and soil, over the new line of road, and that thereby inconvenience and risk of danger would be incurred by travellers. That the clerk of the trustees of the turnpike-road by letter gave them notice to remove the obstructions, or that proceedings would be taken by them against the Company. That the Company intended to continue, and to extend and enlarge the obstruction and encroachment, and the information prayed, that it might be declared, that the said scaffolding and timbers, and arch, bridge, or viaduct, were works not within the scope and meaning of, or authorized by, the Com-

pany's acts of Parliament; or, if the Court should be of opinion that the same were within the scope and meaning of, and authorized by, the Company's acts, then, that the Railway Company, might be directed, at their own expense, before the said new line of road was gone across by them, to cause a good and sufficient road to be set out and made, instead of such road so intended to be gone across; and that the Railway Company might be restrained by the order and injunction of the Court from continuing or suffering to remain the obstruction and encroachment on the said new line of road, and from extending or enlarging the said obstruction or encroachment by any further works whatsoever; and, if proper, that the Railway Company might, in like manner, be restrained from going across the new line of road by means of any arch, bridge, or viaduct, without having caused a good and sufficient road to be set out and made, instead of such road so proposed to be gone over by them.

On the 22nd July an injunction was granted *ex parte* in the terms of the prayer of the bill. This was a motion to dissolve that injunction.

An affidavit was filed on behalf of the Railway Company, by their sub-engineer, which stated, that, to the east of the bridge, over the new line of road, the railway was carried for a distance of ten chains, on a strong wooden framing, or viaduct; and that it was essential that the space between the timbers should be filled up with earth-work before the winter. That, on the west side of the bridge, there was a spoil bank, which the Railway Company intended to use for this purpose; and that, without purchasing land, which the Company could not then do, their compulsory powers having ceased, they had no earth-work which could be used for the purpose. That the new road, where the railway crossed, was in a cutting of several feet; and, as it was impossible to convey the spoil over the road on a level, the only means to effect this was by widening

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the bridge over the road, or carrying the same on the line of railway. That, the trains passing hourly along the railway, it was not practicable, consistently with the safety of passengers, to carry the spoil along the railway; and it was, therefore, determined to widen the present bridge by means of a temporary erection, so as to allow of another line of rails. That the works gave the same headway as the bridge on which the railway was carried. That the works on the west side of the road were not erected thereon, except to the extent of six inches, and that only for a distance of two feet; and that the works on the east side of the road were not in the carriage-road at all, but only on a foot-path adjoining thereto, and then only by a space not exceeding eighteen inches in breadth and twelve feet in length. That there was no intention of extending the works, which were erected only for a temporary purpose, and would be removed as soon as the viaduct was filled.

Mr. *Wigram* and Mr. *Wood*.—The Company derive their power to do what they have done under the ninth section of the act; and they contend, that they do not come within any of the terms of the 102nd section. The only words there used, which might seem to apply, would be, “go across the road;” but there is a distinction between going across a road, by which is understood the occupying the road itself, and the passing above the road. There is in this case no new crossing. *Att.-Gen. v. London and Southampton Railway Company (a)*; *London and Birmingham Railway Company v. The Grand Junction Canal Company (b)*; *Blakemore v. Glamorganshire Canal Company (c)*.

To a suggestion by the Vice-Chancellor, that, if the 100 and 102nd sections did not apply, there would be no restriction on the Railway Company as to the exercise

(a) *Antè*, Vol. 1, 302.

(b) *Antè*, Vol. 1, 224.

(c) 1 *My. & K.* 162.

of the powers given to them by the 9th section, it was answered, that, as soon as the Company did any thing to inconvenience the public, they would become liable to the terms of the 102nd section, and that the public were thereby fully protected.

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Mr. Russell and Mr. Metcalfe.—The act of Parliament is imperative, and imposes certain conditions on certain acts. They cannot in this case go across the road without making a new road for the public. The Court will not consider or estimate the amount of damage, but will keep Railway Companies within the limits prescribed by their act.

VICE-CHANCELLOR K. BRUCE (without hearing *Mr. Wigram* in reply).—The act of Parliament in this case differs materially from that in the case decided by Lord Cottenham (a). I do not, therefore, intend in any manner to differ from the late Lord Chancellor by my present judgment. I am of opinion, that, although the bridge is a temporary one, and adjoining the regularly made bridge, yet the 100th section has not been complied with; and, on that ground, at least, what has been done is illegal; and, taking the whole act together, I think there has been an infraction of the law, and that, too, without any favourable circumstances. No case of great practical inconvenience has been made out, and I do not think it necessary, considering all the matters before me, nor do I think it necessarily the duty of the Court, to interfere by injunction. The Court will exercise its discretion according to circumstances, and, although there may have been an infraction of the law, it will endeavour to do substantial justice to one party without imposing unnecessary hardship on the other, especially in a case where the legal tribunals are open. I therefore

(a) *The London and Brighton Railway Company v. Cooper*, Antè, Vol. 2, p. 312.

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order, that the operation of the injunction be suspended until the 17th September, or until further order; the defendants, and Mr. Bosanquet, (their chairman), or some other responsible person undertaking that there shall be, and continue until further order, a free, open, and sufficient way and passage along, through, and under the viaduct in the information mentioned, and over and along so much of the line or course of the new turnpike-road, in the information mentioned, as is therein mentioned, for two coaches or waggons to pass each other with convenience; and, also, that there shall be, from and after the 29th inst., and continue until further order, a free and sufficient and convenient footpath along such line and course of road; and that the existing works shall be used and managed with as little damage and inconvenience to the public as may be; and, also, that the Company will abide by such order for compensation for damage as the Court shall make. This order to be without prejudice to any question, except as herein particularly mentioned, with liberty to either party to take any proceedings before two magistrates, or at law, with liberty to apply. The defendants to pay the costs of the motion. The injunction not to apply to any works in existence previous to the month of July instant.

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BEFORE V. C. WIGRAM.

THE NORTH UNION RAILWAY COMPANY *v.* THE BOLTON AND PRESTON RAILWAY COMPANY. *August 2nd.*

BILL filed 20th December, 1841, stated the incorporation of the North Union Railway Company, (4 Will. 4, c. xxv.), and that the object and effect of the said act was to form a railway from the town of Preston to the Liverpool and Manchester Railway in the borough of Newton.

That this railway terminated at one end at the Liverpool and Manchester Railway, and at the other end in Dock-street in the town of Preston, 120 yards north of another street in Preston, called Fishergate, at which spot the said railway joined another railway called the Lancaster and Preston Junction Railway, and the said North Union Railway passed under Fishergate-street by means of a tunnel.

That, in the Spring of 1837, another railway was in contemplation between Preston and Bolton, and an act was applied for, the intention being, as first proposed and stated in such application, to make a railway from Bolton to join the Lancaster Canal Navigation at Preston, having no communication with the North Union Railway, or with the Lancaster and Preston Junction Railway. The plaintiffs opposed the act, on the ground that the contemplated railway was an unnecessary and competing line, particularly that part of it between Preston and Chorley, where it ran nearly parallel and at a short distance from the

Plaintiffs moved for an injunction to restrain the defendants from using, in a manner alleged to be illegal, a communication carried by certain branch rails from plaintiffs' to defendants' railway; and also from using certain other rails, which connected a certain other railway with the defendants' station north of F.; and also from using a station built by the defendants on ground purchased by them of the plaintiffs:—

Held, that a court of equity will not interfere by injunction, but will leave the parties to their legal remedies, plaintiffs having failed to shew, that, by using the communi-

cations, rails, or station, any destruction or irreparable injury would result.

In cases of trespass under colour of title, where the mischief apprehended is irreparable, a court of equity will exercise its jurisdiction to grant an injunction, and, whether the mischief be irreparable or not, it will, by decree, if not by order, upon motion, extend the jurisdiction of preventive justice to all cases of trespass in which damages would be an inadequate and uncertain remedy, and the protection of the right *in specie* is the only mode of doing complete justice.

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North Union Railway. The bill passed into an act, but the committees of both Houses recommended that the two railways should unite north of Chorley; and, in consequence of such recommendation an agreement was entered into by the two Companies for that purpose.

That, as the standing orders of the House did not permit the said agreement to be embodied in the act in the then present session, it was agreed that another act should be applied for in the following session.

That, by agreement in writing, dated the 11th of July, 1837, it was, amongst other things, agreed, that the defendants should not execute any part of the railway or works to the north of Harper's-lane, in Chorley aforesaid, for three years after the passing of the act. That the defendants should apply for an act to form a line of railway from Harper's-lane, or such other place, in the township of Chorley, as might be found convenient, to unite with the said North Union Railway at Euxton; and that, when the junction should have been effected, it should be lawful for all the carriages and traffic, whether in passengers, or in any goods, articles, matters, or things whatsoever, of the defendants' railway, to pass from one of the said railways to the other, and to enjoy a free passage along such part of the plaintiffs' railway as should be between the terminus at Preston and the point of junction, upon payment of certain tolls; and that there should be a clause in the said act to enable the defendants to make a branch line from Walton Summit (part of the Lancaster Canal) to join the plaintiffs' railway, and also a clause directing a branch from the plaintiffs' railway within Preston to the canal.

An act was passed accordingly, (1 Vict. c. cxxi.), and subsequently a mutual deed of covenant was entered into by the plaintiffs and the defendants, binding them to the performance of the clauses and provisions of the said agreement of 11th July, 1837.

That, by an agreement in writing, 26th March, 1838, it was agreed, that the defendants should abandon a branch line of railway within the borough of Preston, for which they had given notice of their intention to apply to Parliament, and should, within five years after the passing of the then contemplated act, complete (a) a communication between the said defendants' railway lying on the north-erly side of Fishergate and the Lancaster Canal by four branch lines of railway, of the same strength and construction as the main line of the plaintiffs' railway; and that the two easternmost branch lines should deviate from the main line of the North Union Railway at some convenient point north of the northern face of the said tunnel under Fishergate-street; and the two westernmost of such branch lines should deviate from the main lines of the plaintiffs' railway at some other convenient point lying to the north of the aforesaid point of deviation of the said two easternmost branch lines. And it was provided, that, in case the said two westernmost branch lines should not be made before two years from the passing of the act then intended to be applied for, or within three years from the end of the then present session of Parliament, it should be lawful for the plaintiffs to make such two westernmost lines. That all communications of the said four branch lines with the main lines of the North Union Railway should be made under the direction and to the entire satisfaction of the engineer of the plaintiffs. That the two easternmost of the said branch lines of railway should be made and maintained at the sole cost of the defendants, (except the costs of excavating a piece of land sold by the plaintiffs to the defendants), and should be for the exclusive use and benefit of the defendants, their successors and assigns. That the costs of making the westernmost lines should (except the costs of purchasing land) be borne by the defendants, and that the said two lines should be for

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(a) 32nd, 33rd, 34th, and 35th sections of 1 & 2 Vict. c. lvi.

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the common use of both Companies, and that separate piers should be constructed at the side of the Lancaster Canal for the use of each Company. That the plaintiffs were the owners of the plot of land and premises called Maxash-house, which lay on the north side of Fishergate, and abutted on the plaintiffs' railway north of their tunnel under Fishergate; and, it having been agreed that the four lines of railway should be carried over a portion of the said plot of land, the plaintiffs agreed to convey the said plot of land to the defendants for such purpose.

In pursuance of this agreement the proposed act was passed, (1 & 2 Vict. c. lvi.), entitled "An act for enabling the Bolton and Preston Railway Company to extend and alter the line of such railway, and to make collateral branches thereto, and for amending and enlarging the powers and provisions of the act relating thereto;" and the terms of the last-mentioned agreement were carried out and embodied in this act.

That, after the passing of this act, the defendants completed the westernmost branch lines, and the same were extensively used by the plaintiffs.

That the defendants had not made the easternmost branch lines, but had then lately begun to make use of the openings and points of communication, made by the plaintiffs for connecting the easternmost branch lines of railway with the plaintiffs' railway, for purposes contrary to, and in fraud of, the said acts of Parliament and agreements, and had made, on the plot of ground conveyed to them by the plaintiffs, certain buildings, &c., for the purposes of a station. That such station would abut upon, and be open to, the northern side of Fishergate-street, and the eastern side of plaintiffs' railway, within seven yards thereof.

That the defendants had also purchased a piece of land immediately to the northward of Maxash-house, and adjoining and running along by the eastern side of plaintiffs' railway to the terminus thereof, and then adjoining to and running along by the eastern side of the Lancaster and

Preston Junction Railway, and had commenced two lines or sidings along the said piece of land and the piece of land sold by the plaintiffs to the defendants, for the purpose of making a communication between the Lancaster and Preston Junction Railway and plaintiffs' railway, and communicating with the defendants' station.

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That the defendants intended to make a communication with the plaintiffs' railway by means of the openings and points which were made in the rails of the plaintiffs' railway, and intended by them for the purpose of communication between the plaintiffs' railway and the Lancaster Canal; and that the defendants intended to occupy part of the plaintiffs' railway, and to carry the two lines or sidings across the westernmost branch lines of railway on a level, so as to interfere with the plaintiffs' free use and enjoyment thereof, and to cause danger, delay, and inconvenience to passengers on plaintiffs' railway. That these lines or sidings could not be used for the purpose of communicating with the Lancaster Canal.

That the station (a), then building by the defendants, was intended for the use of the Lancaster and Preston Junction Railway Company and other Companies; and the bill prayed, that the defendants might be restrained by injunction from further proceeding with the lines or sidings, connecting the Lancaster and Preston Junction Railway with the plaintiffs' railway, and from joining any other lines except the line from Chorley to Euxton, and the two easternmost branch lines authorized by the defendants' act, to the plaintiffs' railway; and also from making use of the points and openings in the plaintiffs' railway for the purpose of connecting the said two lines of railway or sidings with the plaintiffs' railway; and also from temporarily or permanently entering upon or interfering with plaintiffs' railway for the purpose of making the said two lines or sidings, or for any other purpose except as by act authorized; and also from

(a) Vide post, p. 358.

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erecting and using the station, then building by defendants upon the piece of land conveyed to them by the plaintiffs, as or for a station, or any other station upon or within the portion of the plaintiffs' railway lying on the northern side of the point of junction of said two railways at Euxton; and from taking up or putting down any passengers or goods at the said station, or any part of the said portion of the plaintiffs' railway lying on the northern side of the point of junction of said two railways at Euxton, during such term as plaintiffs should provide two stations or stopping-places thereon; and also from permitting or suffering any other Companies to use the said two lines of railway or sidings for the purpose of joining the plaintiffs' railway, and from using the said station, and from taking up or putting down any passengers or goods thereat; and also from making, or altering, or using the said openings, points of communication, and connexion rails, for the purpose of effecting the junction of said two intended easternmost branch lines of railway, or any other so as to prejudice or hinder the plaintiffs' railway, or impede, obstruct, or interfere with the free, uninterrupted, and safe passage along the same, save only so far as should be necessary for the purpose of effecting the said junction by the act authorized, and in the manner therein mentioned; and from making the said two lines of railway or sidings, or any part thereof, or any of the works thereof, over or across the two westernmost branch lines of railway on a level, or otherwise, so as in any manner to interfere with the free and uninterrupted and safe use and enjoyment of such two westernmost branch lines of railway; and that, if necessary or proper, they might be restrained from permitting the said two lines of railway or sidings to continue, and might be ordered to take away and destroy the same.

The defendants, by their affidavits, stated that the plaintiffs were aware that the land sold to them by the plaintiffs was always intended for a station, and, except a very small portion of it, was wholly unnecessary for their

railway, or any other purpose than for a station. That the Lancaster and Preston Railway, running into the plaintiffs' railway at the eastern and western branch lines, would not create any further impediment or obstruction than was caused by the then present mode of transit, which then passed the entrances to both said eastern and western branch lines (a).

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(a) The acts of Parliament and the sections referred to in the judgment were as follows :—

1 Vict. c. cxxi. (Bolton and Preston Railway Act).

Sect. 3. "That it shall be lawful for the said Company, and they are hereby empowered to make and maintain the railway hereinafter mentioned, with all proper depôts, stations, approaches, works, and conveniences connected therewith, in the line or course, and upon, across, under, or over the lands delineated on the plan, and described in the book of reference, deposited &c. ; that is to say, commencing by a junction with the Manchester, Bolton, and Bury Railway, at or near Bradford-square, in the township of Great Bolton, and terminating at or near the canal basin and wharfs belonging to the Company of Proprietors of the Lancaster Canal Navigation, on the northerly side of a certain street called Fishergate, in the borough and township of Preston," &c.

Sect. 11 [gives the Bolton and Preston Railway Company power to use the tramroad, lands, and buildings south of the Ribbles, belonging to the Lancaster Canal Company.]

Sect. 12. "That the Lancaster Canal Company shall set out a

piece of their land of the width of ten yards, on the north side of Fishergate aforesaid, to the south side of the said canal's graving dock; and that the said Bolton and Preston Railway Company shall, at their own expense, lay down, maintain, and keep in repair, along the whole length of the said piece of land of the width of ten yards, two lines of railroad of such dimensions and form as shall be approved of by the committee of the said Company of Proprietors of the Lancaster Canal Navigation, and such two lines of railroad shall belong to and be the property of the said Company of Proprietors of the Lancaster Canal Navigation; and that the said two last-mentioned lines of railroad shall be for the joint use of the said Lancaster Canal Company and Bolton and Preston Railway Company, for the purposes of, and in connexion with, the trade of the said railway and canal, without the payment of any tolls or other compensation by either of the said Companies to the other."

Sect. 13. "That the said Lancaster Canal Company shall set out such quantity of their land, not exceeding 2000 square yards, on the north side of Fishergate aforesaid, and adjoining to the said two lines of railroad from the north side of

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On the 13th of January, 1842, a motion was made by the plaintiffs for an injunction in the terms of the

Fishergate, as the said Bolton and Preston Railway Company, or their committee, shall require to be converted by the said Bolton and Preston Railway Company into, and for ever thereafter to be used as, a station, and for such warehouses and wharfs as the same Company shall think fit to erect for the use of the said Railway Company in connexion with the trade of the said railway and canal; and that the said land, when and so soon as the same shall be ascertained and set out as aforesaid, shall be used by the said Bolton and Preston Railway Company, and their successors, for the purposes hereinbefore declared and expressed in respect thereof,"—[freed from all demands of the said Canal Company, and at such yearly rent, not exceeding 2s. for every superficial square yard, as the committee of the Lancaster Canal Company should fix and require to be paid.]

Sect. 59. "That the lands to be taken or used for the line of the said railway shall not exceed twenty-two yards in breadth, except in those places upon the line of such railway where a greater breadth shall be judged necessary for carriages to wait, load, or unload, or to turn or to pass each other, or for embankments, or for cuttings, or for the erection and establishment of any fixed or permanent steam or other engines, machinery, toll-house, warehouse, wharf, or other erections and buildings, and except for and except &c.; unless with the previous consent in writing

of the owners, &c.: Provided always that it shall not be lawful for the said Company to take or use for the line of the said railway any greater breadth of land than 100 yards, unless where a greater width may be absolutely necessary for forming proper slopes to the said railway, in cuttings or embankments; and unless also for the purpose of depôts and stations, and at the respective terminations of the said railway: Provided also, that the said Company shall not have power to purchase or hold a greater space of land than five acres at any one place for the purpose of a depôt or station, unless at the termination of the said railway at Bolton and Preston respectively, and at neither of those places to a greater extent than twenty acres."

Sect. 79 [gives power to owners of adjoining lands to make branches to communicate with the railway.]

Sect. 80 [gives landowners power to erect wharfs on their own lands adjoining the railway.]

Sect. 196. [Railway to be free to all persons on payment of rates &c.]

Sect. 197 [fixes the rates of tonnage allowed to be taken by the Company for the use of their railway.]

Sect. 200 [empowers the Company to provide and charge for locomotive or other propelling power.]

1 & 2 Vict. c. lvi.—"An act for enabling the Bolton and Preston Railway Company to extend and

prayer of the bill, but it was ordered to stand over generally, with liberty to both parties to apply.

The motion was now renewed.

The *Solicitor-General*, and *Mr. S. Follett*, for the plaintiffs.

Mr. Temple, *Mr. Wood*, and *Mr. Rolt*, for the defendants, cited *The Clarence Railway Co. v. The Great North of England Junction Railway Co. (a)*, *Gordon v. Cheltenham and Great Western Railway Co. (b)*.

The *Solicitor-General* replied.

V. C. WIGRAM, (in the long vacation).—This is an application by the plaintiffs for an injunction to restrain the defendants from using, in a manner alleged to be illegal, a communication (by certain branch rails) which connects the Lancaster Canal with the North Union Railway, and also (as part of the same case) from using certain other rails which connect the Lancaster and Preston Junction Railroad with the defendants' station north of Fishergate, and also from using in like manner a station belonging to the defendants north of Fishergate. It is admitted, that the

alter the line of such railway, and to make collateral branches thereto, and for amending and enlarging the powers and provisions of the Act relating thereto."

Sect. 1. [Powers of 1 Vict. c. cxi. extended to this act.]

Sect. 2. "That, except so far as hereby specifically and expressly authorized, nothing in this act contained shall extend, or be deemed or construed to extend, to prejudice, diminish, alter, or take away any of the rights, privileges, pow-

ers, franchises, or authorities of, or vested in, or belonging to the North Union Railway Company, but that all such rights, &c. which belong to or are vested in the said North Union Railway Company under their several acts of Parliament, or otherwise, except as aforesaid, shall be and are hereby expressly saved and reserved to the North Union Railway Company."

(a) *Antè*, Vol. 2, p. 763.

(b) *Id.* pp. 800, 872.

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defendants have a right to make use of the first-mentioned communication, and of their station north of Fishergate, for the purpose of conveying passengers and goods to and from the Lancaster Canal along the North Union Railway. But the defendants have made use of that communication for the general purpose of conveying passengers and goods to and from their station lying north of Fishergate along the North Union Railway, whether such passengers and goods have come from, or are going to, the Lancaster Canal or otherwise. In fact, the defendants (as I understand the case) have made a branch railroad connecting the Lancaster and Preston Junction Railway with the defendants' station north of Fishergate; and by means of some arrangements come to between the Lancaster and Preston Junction Railway Company and the defendants, all, or nearly all, the passengers arriving at the Preston terminus of the last-mentioned railway are carried to the defendants' station north of Fishergate, and are either set down there, or conveyed onwards by the defendants along the North Union Railway. The plaintiffs, by their original bill, (which was filed before the defendants' works were completed), complain of the injury they would sustain if the defendants should be permitted to establish and use a rival station at Preston. By their supplemental bill, (which was filed after the defendants' works were completed), the plaintiffs complain of the practical inconvenience they suffer from the defendants' crossing their line. In both bills the plaintiffs insist, that the use the defendants are making of their station north of Fishergate, and of the communication with the North Union Railway, is illegal, except for the limited purpose of the traffic between the canal and the North Union Railway. There is nothing, however, in the position or construction of the defendants' station north of Fishergate which (as I understand the case) can be deemed illegal, supposing the use they make of that station to be free from objection. The

illegality (if any) connected with the station only must, I conceive, be confined to the use which the defendants make of it. The right which is conceded to the defendants to use their station and the communication between the canal and the North Union Railway, for a limited purpose, is material to the plaintiffs' case.

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The jurisdiction of this Court to grant injunctions in cases of pure trespass is comparatively of modern establishment. But it is now clearly settled, that, in cases of trespass under colour of title, where the mischief apprehended is irreparable, the jurisdiction of the Court exists; and I incline strongly to the opinion, that, whether the mischief be irreparable or not, this Court ought, by decree at least, if not upon motion, to extend and apply the jurisdiction of preventive justice to all cases of trespass in which (by analogy to cases of specific performance) damages would be an inadequate and uncertain remedy, and the protection of a right *in specie* the only mode of doing complete justice between the parties. I have thought it right to make these latter observations, lest the defendants, in the future progress of their litigation with the plaintiffs, should be misled by some remarks which fell from me during the argument of the case.

The questions which I have to consider are these : 1. Are the acts complained of illegal? 2. If the acts complained of are illegal, is the injury to the plaintiff such, in nature and extent, that this Court ought, in any stage of the cause, to interfere? 3. Ought this Court (in any view of the case) to interfere until the right claimed by the plaintiff shall have been established at law?

In considering these questions, it will be convenient that I should first consider the second question. By the act 1 Vict. c. cxxi. the defendants were incorporated by the name of the Bolton and Preston Railway Company, for the purpose of making a railway from Bolton to Preston. The northern terminus of this railway was to be "at or near the

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canal basin and wharfs belonging to the Company of Proprietors of the Lancaster Canal Navigation, on the northerly side of a certain street called Fishergate, in the borough and township of Preston.”—(Sect. 3.) At the time when the act passed, the Lancaster Canal Company were proprietors of a railway or tramroad running from Walton Summit to the north side of Fishergate, (the intended northern terminus of the defendants’ railroad); and it was thought expedient by the Legislature that the defendants should have power to adopt and use, for the purpose of their intended railway, all such parts of the Canal Company’s railway or tramroad as the defendants should think fit; and accordingly, by the 11th section of the act 1 Vict. c. xxi. the interest of the Canal Company in their railway or tramroad, between the limits I have mentioned, was transferred from the Canal Company to the defendants. By the 12th section the Canal Company were to set out land of the width of ten yards on the north side of Fishergate, upon which the defendants, at their own expense, were to lay down, maintain, and keep in repair, two lines of railroad connecting the canal with Fishergate, for the joint use of their two companies, &c., for the purposes and “in connexion with the trade of the said railway (meaning the Bolton and Preston Railway) and the canal.” By the 12th section, the Canal Company were to set out such quantity of land, not exceeding 2000 yards, as the defendants should require, on the north side of Fishergate, and adjoining the two intended lines of railway on the same side, to be converted by the defendants into and used as a station, and for such warehouses and wharfs as the defendants should think fit for the use of the Railway Company in connexion with the trade of the railway and canal. I may here observe, (with reference to an argument at the bar), that there is nothing in the power given to the defendants by the 12th section of the act to make warehouses and wharfs, which restricts the general sense in which the word “station” (as used in

the 13th section of the act) appears, from subsequent clauses of the act, to have been used. The act contains further provisions obliging the defendants, at their own expense, to make sufficient communications between the canal and the defendants' railway, and otherwise for the benefit of the Canal Company, including a rent of £8000 per annum to be paid by the defendants to the Canal Company, in consideration of the property and rights belonging to the Canal Company which were to be assumed and taken by the defendants. Referring to the above clauses of the act, and also to the 59th (a) section, (as far as it regards the station to be made at the Preston terminus of the railroad), referring also to the 79th, 80th, 196th, 197th, 200th (a), and other general clauses, I have no hesitation in concluding (in accordance with the defendants' argument), that, by the effect of that statute, the defendants were intended to have, and empowered to make, on land north of Fishergate, a station (in the largest sense of the word) for passengers and goods, whether coming from, or going to, the canal, or from or to such station only; and secondly, that they (the defendants) were obliged, in favour of the Canal Company, (at the time when it was intended that their railway or tramroad should be taken from them), to give to that Company the accommodation pointed out by the act.

Such was the position of the Bolton and Preston Company at the time of passing the act, upon which the arguments before me principally turned. Now, upon inspection of a map of the county, shewing the line of the North Union Railway and the line originally projected for the Bolton and Preston Railroad, it will be seen, that the line of the former, from Euxton to Preston, and the line of the latter, from Chorley to Preston, run parallel to, and not very far distant from each other; and it was thought expedient that the defendants' intended line, north of Chorley, and lying between Chorley and Fishergate, in

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(a) Antè, p. 352, note.

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Preston, should be discontinued, and that the defendants should be authorized to unite the Bolton and Preston Railway by a line between Chorley and Euxton, so as to have one line of railway only for the use of both Companies (plaintiffs and defendants) between Chorley and Preston. An agreement to this effect was come to between the parties; and the statute 1 & 2 Vict. c. lvi. was passed to give effect to the above agreement. That statute, (sect. 1), after reciting the previous act, expressly saves to the defendants all the powers, authorities, provisions, directions, matters, and things contained in the first act, and extends them to the objects and purposes of the second act. The second act then recites the expediency of discontinuing the defendants' line north of Chorley, and of connecting Chorley with Euxton. It recites the agreement between the parties, to which I have before adverted. It then (sect. 3) repeats such of the powers contained in the previous act as relate to that portion of the defendants' line which lies between Chorley and Fishergate-street, in Preston, save so far as they may be applicable to the new line between Chorley and Euxton. It requires (sect. 4) the defendants to abandon the line between Chorley and Fishergate, and empowers them to make the line from Chorley to Euxton. The act then (sect. 21) declares, that, so soon as the junction between Chorley and Euxton shall have been effected, it shall be lawful for the defendants, and all other persons using the defendants' railroad, to pass along and use the plaintiffs' railroad, and to take up passengers and goods at any of the stations and stopping-places on the North Union Railway, under these restrictions only, that the passengers and goods carried towards Preston must have been taken up at some of the usual stations or stopping-places on the defendants' railroad, and the passengers and goods carried towards Bolton must be carried to some of the usual stations or stopping-places on the defendants' line. And the defendants are not to be at liberty to have stations or stopping-places

of their own on the plaintiffs' railroad north of the point of junction at Euxton, unless the plaintiffs shall cease to use two stations or stopping-places, at least, on that portion of their line which lies north of the point of junction. The 24th section of the act declares, that nothing therein contained shall authorize or empower the defendants, or any person using their railway, to put or place any engines or waggons, or lay, place, or deposit any goods, wares, merchandize, matters, or things whatsoever, or in any other manner to use all or any stations, houses, warehouses, wharfs, piers, sheds, or sidings, at stations of or belonging to the North Union Railway Company, (except sidings and intermediate stations between Preston and the point of junction which the Bolton and Preston Railway Company are to have the same power of using as others using the North Union Railway Company shall for the time being have), without the consent in writing of the North Union Railway Company under their common seal. Then follow the clauses relating to the communications to be made between the canal and the railroad. The 32nd clause recites, that, by reason of the abandonment of that part of the defendants' line which lay between Chorley and Fishergate, the defendants' communication with the canal would be prevented; but that, inasmuch as the estimated income of the defendants included tolls received by them in respect of traffic of the Lancaster Canal expected to pass along their line, an agreement was come to between the two railroad Companies (the plaintiffs and defendants) for inserting in the act a clause for making branch lines of railway from the North Union Railway to the Lancaster Canal, in order the more conveniently to bring the canal traffic upon and from the North Union Railway; and that, if the North Union Railway Company should be desirous of using those branch lines for the purpose of conveying goods and passengers to the canal, a clause should be inserted in the act to that effect. The act then recites a deed of covenant, dated the 26th March, 1838, made be-

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tween the defendants, of the one part, and the plaintiffs, of the other part, by which the plaintiffs agreed to convey to the defendants a plot of ground upon which two branch railways were to be laid, connecting the North Union Railway with the Lancaster Canal. The act then obliges the defendants, within a given time, to make four branch lines connecting the plaintiffs' railway north of Fishergate and the Lancaster Canal. By the 33rd section of the act, the two easternmost lines were to be for the use of the defendants and the Canal Company, "for the purpose of, and in connexion with, the trade of the same railway and canal respectively." And by the 34th section, the two westernmost branches were to be for the use of the plaintiffs, the defendants, and the Lancaster Canal Company, "in connexion with the trade of the same railways and canal respectively." The act also contains clauses regulating the manner in which the communications with the North Union Railway shall be constructed and used. Lastly, by the 60th section, the Canal Company are to set out such quantity of land, not exceeding 2000 square yards, to be converted by the defendants into, and used as a station, and for such warehouses, wharfs, and other purposes, as the defendants shall think fit to erect and make for their own use, in connexion with the trade of the railway and canal respectively.

Upon this act, I observe, that, if it has in the slightest degree curtailed the powers and privileges of the defendants to carry all passengers and goods from Preston to Bolton, or from Bolton to Preston, I am satisfied that such a construction of the act would be a surprise upon the Legislature. It is impossible to read the first act without seeing that the defendants were intended to be carriers of passengers and goods of every description from one terminus of their line to the other; and that the second act (by the most express words of recital as to its object) was intended only to substitute one link for another in the chain of communication between the two places,

without in any way curtailing the powers and privileges of the defendants as general carriers of passengers and goods. The plaintiffs, however, may admit this, and avoid the effects of it, (as by their pleadings they endeavour to do), by insisting that the second act has given to the defendants a sufficient use of the plaintiffs' station at Preston to enable them to carry all passengers and goods along their line. This argument, whatever bearing it may have upon the question of law which I shall presently have to consider, proves too much for the plaintiffs with respect to the point I am now considering, viz. the nature and extent of the injury to the plaintiffs from the acts of the defendants. It proves that the defendants have not carried, and cannot carry, any passengers nor any goods which, by law, they are not authorized to carry, and which they might not carry, provided such passengers and goods were taken up and set down at the plaintiffs' station at Preston; and, if the plaintiffs' and defendants' lines respectively terminated towards the south at points short of the Manchester and Liverpool Railway, the plaintiffs' ground of complaint would necessarily be confined to the inconvenience arising from the defendants' carrying across their line (which for some purposes they have an admitted right to do) a greater quantity of passengers and goods than the law allows them to carry across that line, though not more than the law allows them to carry along the line of the North Union Railway. And I am satisfied that the real grievance in the present case arises principally out of the circumstance that the two railways do not terminate at the south short of the Liverpool and Manchester Railways. The two Companies are, in fact, competitors at Preston for all passengers and goods going from Preston along the Liverpool and Manchester line. If all the passengers and goods coming along the Lancaster and Preston Junction Railway to Preston were discharged at the plaintiffs' station there, and the plaintiffs and defendants had equal convenience

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there, the plaintiffs and defendants would compete upon an equal footing at Preston for the passengers coming by the Lancaster and Preston Junction Railway, and going onwards to the Manchester and Liverpool line. But by the arrangement said to have been come to between the Lancaster and Preston Junction Railway Company and the defendants, all passengers and goods coming along the Lancaster and Preston Junction line are discharged at the defendants' station north of Fishergate, and the defendants thereby command a great advantage over the plaintiffs in respect of the traffic, from the north onward to the Manchester and Liverpool Railway.

It was to this I alluded at the outset, when I cautioned the defendants against being misled by certain observations I had made during the argument. If the defendants' acts, which are now complained of, be illegal, this case will fall under the principles explained by the Vice-Chancellor in *Alderley v. Dixon* (a). The injury to the plaintiffs cannot possibly be measured in damages; any damages a jury could award must necessarily be speculative. The result of free competition might be to give the whole traffic to one of the contending parties, or it might divide the traffic in any given or fluctuating proportions. It is impossible to ascertain beforehand what the result of competition might be, and the case is one in which, if justice is to be done between the parties, it can only be done by securing to each *in specie* the enjoyment of the rights conferred upon it by the Legislature, and it is only by injunction that those rights can be so secured. But whether an order for that purpose should be made before hearing of the cause, or before trial of the right at law, is another question. With respect to that upon which (as I have already observed) the pleadings in the supplemental bill put the case, the inconvenience occasioned to

(a) 1 Sim. & Stu. 607.

the plaintiffs from the defendants' excess (if any) in carrying a greater traffic across their line than by law (as is said) they are empowered to do, (though not exceeding what they may lawfully carry along the line); with respect to that, the evidence, as to what up to this time has been done, certainly does not prove a case of such serious obstruction, as to oblige the Court, as in a case of waste, destruction, or other mischief strictly irreparable, to grant an injunction. This is a case in which (according to the usual course of the Court) the defendants have a right to require that the question should be tried at law before the injunction issues.

The next question, then, to be considered is, whether the act complained of is so clearly and indisputably illegal, that I ought at once to come to a conclusion upon that point? If the 32nd and following clauses of the stat. 1 & 2 Vict. c. lvi. are to be read alone, it would be difficult to suppose that they were intended to confer upon the defendants any other than the limited right to which the plaintiffs seek to confine them. But if from other sources it can be shewn, that the defendants were intended to enjoy rights more extensive than those which that limited construction of the act would confer, I have no difficulty in saying, that the particular language of the act (explained by the intention of the Legislature to insure, at all events, a communication between the canal and the railroad) is not inconsistent with the larger construction of the act for which the defendants have contended. Now, upon the general extent of the power conferred upon the defendants by the stat. 1 Vict. c. cxi., and upon the limited object of the stat. 1 & 2 Vict. c. lvi., I have already intimated my opinion. If in these circumstances no right whatever had been reserved to the defendants to make use of the plaintiffs' station at the Preston terminus of the line, a legal right in the defendants to make use of their station north of Fishergate for general purposes of traffic (not confined to traffic to or from the canal) would almost

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have resulted as a right of necessity. The circumstance that a limited right to use the plaintiffs' station at Preston is reserved to the defendants, impairs the force of the argument which would otherwise have been open to them. But in proportion as that limited right can be shewn to be insufficient for the purpose of insuring to the defendants the rights which, as carriers upon the entire line, they were clearly intended to enjoy, in the same proportion does the argument to which I have adverted regain its force. The right which the defendants have of using the plaintiffs' station at Preston is (as I understand the case) no greater than that which is enjoyed by all other persons. It is a right, the defendants say, of a most limited kind. It will not, the defendants say, entitle them, as of right, to have the necessary accommodation of a booking-office. If the plaintiffs are correct in saying, that the right of the defendants to use the communication between the canal and North Union Railway is strictly confined to the canal traffic, it may deserve consideration and inquiry, what is to become of the defendants' engines and carriages arriving at and departing from Preston, except at the moments of arrival and departure? Also, whether the plaintiffs' argument does not wholly exclude the defendants from the carriage of goods upon the line, and give a monopoly of such trade to the plaintiffs; for, without the right to erect and maintain warehouses at the Preston terminus, (and the plaintiffs' argument wholly excludes that right, except at their will and pleasure), the privileges of the defendants, as carriers of goods, are crippled, if not destroyed: and, in considering the weight (if any) due to these matters, it may be important to bear in mind, that, by the North Union Railway Company Act, (the 4 Will. 4), the defendants have an undoubted right to pass along the North Union line, provided they can once lawfully get there; that under the same act all her Majesty's subjects, being owners of land adjoining the railway, have the right, except in particular places, to have communications made from their

lands on to the railway for the purpose of carriage. Now, admitting for the purposes of the argument that the *locus* of the rails between the canal and the North Union Railway is within the exception I have just adverted to, and that the defendants could not lawfully have made the communication in question without express power to do so, is it clear that the defendants, having been taken out of the exception I have adverted to by express enactment, were not intended to have all the general powers which the original act clearly intended to confer upon them? And is it quite clear that the defendants, when applied to for a passenger's ticket at their station north of Fishergate, are bound (at the peril of committing a misdemeanour) to ascertain that the party applying for the ticket has come by the canal, or, in travelling towards Preston, they are bound to separate their passengers and goods into two classes of carriages, accordingly as they may be going or not going forwards by the canal? I do not mean, however, directly or indirectly, to intimate any opinion upon the legal question. I have referred to some of the leading points upon which that question may be supposed to turn, only as they may bear upon the third question I have to consider, viz. whether I should grant the injunction prayed, before a trial at law.

Now, upon that third question, adverting to the great reluctance which this Court has always shewn to grant injunctions against trespasses in the nature of nuisances affecting private rights until the legal right had been established by trial at law, (amounting, it has in some cases been said, to a positive rule not to grant the injunction before trial (a)), I am clear that the course of the Court, in cases like the present, entitles the defendants to call upon me, without forming a decided opinion upon the law of the case, not to decide against them in the pre-

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sent stage of the inquiry. In coming to this conclusion, I am, of course, governed, in some degree, by the nature of the injury complained of as not being irreparable, in the sense of waste or destruction, and I must, therefore, be distinctly understood as not repudiating my right to grant an injunction at any moment, if the defendants, from carelessness, wilfulness, or otherwise, should so exercise the privilege they claim as seriously to obstruct the plaintiffs in the use of their own railway. There is nothing in the evidence before me which can lead to the conclusion that any such obstruction has hitherto been offered, and the observation can scarcely be necessary, that mutual arrangements may without difficulty relieve both parties from inconvenience, whilst the question between them shall remain *sub judice*.

I have hitherto noticed the arguments which were addressed to me, so far only as they applied to the communication between the canal and the North Union Railway, and I do not think it necessary now to consider the alleged illegality of the railway between the Lancaster and Preston Junction Railway and the defendants' station north of Fishergate. If the use made of the communication between the canal and North Union Railway is to be restrained, the other will become immaterial; if, on the other hand, the use made of that communication is not unlawful, or is not to be restrained upon grounds affecting that part of the case only, the railway made between the Lancaster and Preston Junction Railway and the defendants' station north of Fishergate will, at the utmost, be an unlawful mode of conveying passengers and goods to that station when they might be lawfully brought there by other means. Upon these pleadings, and upon this evidence, I think that that would not be a ground for injunction, if the defendants should prove to be right in all other respects. In the above observations, I have not noticed one of the points made by the defendants, viz. that the plaintiffs' line north of

Fishergate is not protected by the act of Parliament, upon the ground that it was not completed in the time required by the act of Parliament. Upon the whole, I think the proper order to make is—

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That the motion do stand over ;

That the plaintiffs are to bring such action or actions as they may be advised, to try the rights they claim ; and

That the Judge be requested to indorse any special matter upon the *postea*.

Liberty to all parties to apply.

VICE-CHANCELLOR OF ENGLAND.

LORD PETRE v. EASTERN COUNTIES RAILWAY
COMPANY (a).

August 8th.

THE bill was filed August 4th, 1843, and the material facts therein stated were:—That by an indenture of the 7th section of the Eastern Counties Railway Amended

Act, (1 & 2 Vict. c. lxxxi.), enacted, “ that no road, wharf, yard, engine, station, loading or unloading places, warehouse, toll-house, building, machine, or machinery, nor other erection should at any time or times thereafter be made or erected by the Company on any part of the estate of the plaintiff, nor within one mile of certain mansion-houses therein mentioned.

The Company, however, without such consent, erected a platform and made steps to the top of the embankment of the railway, and set down and took up passengers, and otherwise used the platform, &c, as a station, and commenced making a carriage-road from a certain lane to the top of the embankment.

The plaintiff obtained an injunction restraining the Company from using the station, platforms, stairs, steps, carriage-road, and other works and erections, for the purpose of communicating with the railway, or for the purpose of taking up or setting down passengers, and from stopping at or near the said station or the said platforms, for the purpose of taking up or setting down passengers or goods, and from establishing or using any other or further works, buildings, or erections, upon either side of their railway at the place where the same was traversed by Stock-lane, and from making and using any road or way to communicate with the said railway at or near the same place, and within one mile of Ingatstone Hall, without the license and consent of plaintiff:—*Held*, on motion to dissolve, that the whole injunction should be continued until the defendants should remove the platform and stairs, and when that should have been done the injunction should be dissolved without further order, except as to the road; and the defendants were to pay the costs:

That the company were not prevented, by the words of the 7th section, from stopping their engines when they pleased and letting the passengers get out as they best could:

That steps, or a permanent ladder, would come within the terms of the 7th section, and that a road, platform, and steps, would collectively constitute a station.

(a) See *Lord Petre v. The Eastern Counties Railway Co.*, ante, Vol. 1, p. 462.

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25th April, 1836, the Committee of Management of the Eastern Counties Railway entered, among others, into a covenant with the plaintiff, that no wharfs, yards, stations, depôts, loading or unloading places, lime or brick-kilns, steam-engines, or erections, or buildings, or any buildings whatsoever, should, at any time or times thereafter, be made or erected on any part of the estate of the plaintiff without plaintiff's consent in writing, and that, within three weeks after the passing of the act then in contemplation, the Company should, by an instrument under their common seal, ratify and confirm that agreement. That, in an indenture of the 12th June, 1838, made between the plaintiff and the said committee of management, a covenant was, among others, entered into, "that no road, wharf, yard, engine, station, loading or unloading place, warehouse, toll-house, building, machine or machinery, nor other erection, shall, at any time or times hereafter, be made or erected by the said Company on any part of the said estate of the said Lord Petre, nor within one mile of the mansion-house of Thorndon Hall, or the mansion-house of Ingatestone Hall, except with the consent of the said Lord Petre, or other the owner or owners thereof, except as denoted on the said plan hereto annexed." That, in reliance on the covenants contained in the said indentures, plaintiff discontinued his opposition to the bill then pending, which passed into an act on the 27th July, 1838, intitled, "An Act to amend and enlarge the Powers and Provisions of the Act relating to the Eastern Counties Railway."

That, by the 7th section of the said last-mentioned act, it was enacted, "that no road, wharf, yard, engine, station, loading or unloading place, warehouse, toll-house, building, machine, machinery, nor other erection, shall, at any time or times hereafter, be made or erected by the said Company on any part of the estate of plaintiff, nor within one mile of the mansion-house of Thorndon Hall, or of the

mansion-house of Ingatestone Hall, except with the consent of plaintiff, or other the owner or owners thereof, and except at or near Brentwood, adjoining the public road leading from Brentwood to Ingrave, on the north-west side of the line of the said railway, where a station may be made."

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That the plaintiff afterwards, by deed, consented to a station being made at Old Hall-lane, which crossed the railway, at a level, within the distance of half a mile from Ingatestone Hall; but the Company did not avail themselves of such consent, but in the month of August, 1842, applied to the plaintiff for permission to erect a station at a different point, where the railway was carried along the bottom of a cutting, the sides whereof were precipitous and about twenty-eight feet in height, and where such cutting was traversed by a lane called Stock-lane, carried by a bridge over the railway; but the plaintiff refused to give his consent to the erection of a station at the latter point.

That, on the 22nd July, 1843, the said Eastern Counties Railway Company, without giving the plaintiff any notice of their intention so to do, proceeded to make and erect a station upon the said railway at Stock-lane, and had since made and erected, on land belonging to the Company, a station, consisting of a certain wooden platform, of 150 feet in length, on the north side of the said railway, and another similar wooden platform, of 130 feet in length on the south side of the said railway, both of which platforms were carried under the said bridge by which Stock-lane traverses the railway, and were of the width of five feet, except under the bridge, where they were respectively of the width of two feet six inches. That such platforms respectively had been made and were used by the said Company for the purpose of taking up, setting down, landing, loading and unloading passengers and goods, to and from the trains and carriages of the said Company travel-

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ling upon the said railway, without using the steps of such carriages; and that the said platform on the north side of the said railway was raised or elevated to the height of two feet six inches above the level of the railway, and that the platform on the south side thereof was raised and elevated one foot, or thereabout, above the level of the railway. That the Company had also, since the 22nd July, 1843, made and erected upon their own land, for the purposes of a station, a certain wooden erection or stair, on the north side of the railway, consisting of fifty-two steps, and also a certain other wooden erection or stair, consisting of a flight of steps on the south side of the railway, which communicated with Stock-lane, in order that passengers might ascend and descend, and that goods might be conveyed from the railway to Stock-lane, and from Stock-lane to the railway. That from and since 25th July, 1843, the Eastern Counties Railway Company had caused their trains to stop and wait daily at the said station, consisting of the platform and other erections so by them made and erected at and under Stock-lane as aforesaid, and had there daily taken up and set down and landed passengers travelling upon the railway, which passengers had passed and approached, and daily continued to pass and approach to the railway from and to Stock-lane; and by means of the northern erection or stair the Company had also daily loaded and unloaded goods from their trains and carriages. That the Company had stationed and kept men in their service and employ upon the northern platform, and at the top of the northern stair, for the purpose of regulating the admission and departure of passengers and persons coming to and from the said railway, and for the purpose of demanding and receiving from passengers by the railway, stopping at the station, tickets or vouchers of the previous payment of their fares; and also for the purpose of receiving the fares of persons about to travel from the station by the trains, and delivering to such last-mentioned persons

tickets or vouchers for the payment of such fares; and also for the purpose of receiving and delivering parcels and goods carried or intended for carriage by the railway, and charging and taking money for the carriage thereof. That such tickets or vouchers of passengers by the railway, stopping at the station, had been, since the 25th July, 1843, and were still daily demanded and received; and such fares of persons intending to travel from the station had been and still were daily received, and tickets and vouchers for the payment of such fares were daily delivered, and parcels and goods received and delivered respectively, and money still was daily charged and received for the carriage of such parcels and goods by the servants of the Company, as well upon the said northern platform as in a cottage or building adjacent to the bridge belonging to the Company; and that passengers travelling or intending to travel from Ingatestone and the neighbourhood, by the railway, to other places, had been daily, since the 25th July, 1843, in the habit of waiting upon the said northern platform for the arrival of the trains and carriages of the Company, and had been admitted thereto, for the purpose of so waiting for the trains and carriages, by the servants of the Company. That the Company had erected, at the top of the said northern stair or steps, a board, to which they had caused to be affixed a paper writing, containing an account of the times fixed for the daily stoppage of the trains of the Company at the said station or platform, and that they had announced that two of the trains to or towards London from Chelmsford and Colchester would stop daily at Ingatestone, (meaning by Ingatestone the said station, consisting of the platforms and other the erections aforesaid), for the purpose of taking up and setting down passengers; and that three of the trains from London to Chelmsford or Colchester would in like manner stop daily at Ingatestone. That they had, since 25th July, 1843, published and circulated advertise-

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ments, containing, amongst other things, a list or account of fares charged by the Company for the conveyance of passengers upon the railway. That by the Ingatestone station, mentioned in said advertisement, was meant the said station, consisting of platforms and other erections, at and under the bridge by Stock-lane. That the Company were then proceeding to make, and had begun, and threatened and intended to complete, for the purposes of a convenient approach for carriages to the said station on the north side thereof, a broad carriage road, running in a circular curve from Stock-lane to the top of the erection or stair on the north side of the railway, and returning from thence by a continuance of the same curve into Stock-lane; and that they had also collected divers materials, and made divers preparations for divers other works and erections, which they threatened and intended to make and erect on both sides of the railway, at the point where the same was traversed by Stock-lane, without the license of plaintiff.

And the bill prayed, that the Eastern Counties Railway Company might be restrained, by injunction from continuing the station, platforms, stairs, steps, carriage-road, and other works and erections, so by them made at the place where the said railway was traversed by Stock-lane, or any of them, without the license or consent of plaintiff; and that they might also be in the meantime restrained from using or continuing to use, by themselves, their agents, officers, contractors, servants, or workmen, or permitting or continuing to permit any passengers or other persons, travelling upon the said railway, to use the said station, platforms, stairs, steps, carriage-road, and other works and erections, or any of them, for the purpose of communicating with the said railway, or passing to or from, or waiting for, or quitting, or entering the trains and carriages plying upon or along the said railway, or any of them, for the purpose of taking up or landing, or

setting down, or loading or unloading any passengers or goods, upon or from the said trains and carriages, or any of them, and from stopping, or causing or permitting to be stopped, at or near the said station or the said platforms, or either of them, for the purpose of taking up or landing, or setting down, or loading or unloading passengers or goods, upon or from their said trains or carriages, or any of them; and that the said defendants might in like manner be restrained from making, erecting, forming, establishing, or using any other or further works, buildings, or erections, work, building, or erection, whatsoever, at or upon either side of their said railway, at the place where the same was traversed by Stock-lane, and from making and using any road or way to communicate with the said railway at or near the same place, and within one mile of Ingatestone Hall, without the license and consent of plaintiff.

An injunction was granted in Vacation, in the terms of the prayer of the bill; and this was a motion by the defendants to dissolve that injunction.

Mr. *Wakefield*, for the Company, relied entirely on *Eton College v. Great Western Railway Company* (a).

Mr. *Bethell* and Mr. *Palmer*, for the plaintiff.

In the course of the argument, the *Vice-Chancellor* said:—I am of opinion, that, if the platform and stairs were taken away, the Company would not be prevented, by the terms of the 7th section, from stopping their engines where they pleased, and that the passengers might then get in or out as they best could. I also think that steps would come under the head of “machinery,” or “machinery or other erection,” and that a permanent

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(a) *Antè*, Vol. 1, p. 100.

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ladder would be an erection within the meaning of the act of Parliament; and I am also of opinion, that the road, platform, and stairs together constitute a station.

THE VICE-CHANCELLOR.—Let the injunction be continued until the defendants shall have completely removed the platform and stairs; and when the platform and stairs shall have been completely removed, let the injunction be dissolved without further order, except as to the road. The defendants to pay the costs.

BEFORE VICE-CHANCELLOR WIGRAM.

March 18th
 and De-
 cember 13th.

C. T. TOWER, C. TOWER, C. J. H. TOWER, (an infant), and
 A. A. MOULD, v. THE EASTERN COUNTIES RAILWAY
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A., on whose fields a Railway Company had entered without notice or permission, filed a bill, and applied for an injunction to restrain them from digging away a part of one field and depositing it on a certain other field; but, it appearing that there had been a disposition to treat on the part of A., and it also being proved by affidavit that the steps taken by the Company were necessary for the public safety, the injunction was refused, upon an undertaking by the Company to pay into Court the probable value of the land taken.

THE plaintiff C. T. Tower was tenant for life in possession, and the plaintiff C. Tower was tenant for life in remainder, and C. J. H. Tower (the infant) was tenant in tail in remainder, of an estate at Southweald, and the plaintiff A. A. Mould was tenant of the same estate, under a farming lease. Part of the said estate consisted of two fields, called "East" and "West Field," and of a small piece of land called the "Nag's Head-lane Piece." The Eastern Counties Railway Company were incorporated by an act of

A subsequent treating with a Railway Company will be considered by the Court as a waiver of objection to proceedings, the subject of the treaty, although such proceedings be not in fact authorized by the Railway Act.

Eight days' notice of intention to file a bill, where there has been a previous treating, held not sufficient to entitle a plaintiff to his costs.

A court of equity discourages compromises which do not settle the whole of the matter in dispute, and which leave the question of costs still to be decided.

the 6 & 7 Will. 4, c. cvi, and were invested by that act with the usual powers of compulsorily taking land for the purposes of making their railway. By two subsequent acts their powers had been continued for a longer period; but, at the time the present suit was instituted, those powers had expired. The Company had purchased of Mr. Tower several acres of land, for the purpose of making their railway, and the line had been completed at the time the bill was filed, and was then open to Colchester. The railway passed through the estate of Mr. Tower, at Southweald, and the fields called East Field and West Field, and the Nag's Head-lane Piece, all abutting on the railway. On the 22nd of December, 1842, the Company alleged by their agent, that a slip, or falling in of the earth, had taken place in that part of the railway which adjoined East Field; and the Company, as stated in the bill, and as admitted by the defendants, without any license or authority from the plaintiffs, and without giving any notice, directed a considerable number of workmen to enter upon East Field, and to dig away large portions of the soil of East Field, which they carried away and deposited on the Nag's Head-lane Piece.

Mr. C. T. Tower then applied to the Company to desist from digging and carrying away the soil from East Field, and from depositing the same on the Nag's Head-lane Piece; and on their refusal, on the 2nd of January, 1843, Mr. C. T. Tower, and his tenant caused notices of action to be served on the Company. On such notices of action being served, a correspondence took place between Mr. Tower's solicitor and the solicitors of the Company, with a view to an amicable arrangement, and the notices of action were abandoned. Mr. Tower required the Company to furnish him immediately with the exact quantity of land required by them, and to come forthwith to an understanding respecting the price to be paid for such land; but it was not until the end of January,

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1843, that the surveyor of the Company left with Mr. Tower's solicitor a map or tracing, purporting to be a description of the ground required by the Company for the purpose of repairing the slip, at which time no offer or statement of any price was made. In this map or tracing a portion of West Field appeared to be included; and it was alleged by the bill that West Field was at some distance from the place where the slip was alleged to have taken place, and that no part of it was necessary for the purpose of repairing the accident. The Company proceeded to stake out the land marked in the map or tracing, and they staked out in East Field 15 perches, and in West Field 1 rood, 25 perches, and the whole of the Nag's Head-lane Piece. On the 11th of February, 1843, Mr. Tower's solicitor wrote to the secretary of the Eastern Counties Railway Company, as follows:—

“I have received another letter from Mr. Tower, complaining of the delay in settling this matter, and stating that it must not be allowed to rest any longer as it is; I trust, therefore, I shall shortly hear from you on the subject. If a liberal offer is made, and the matter satisfactorily arranged, I dare say Mr. Tower would not press for the immediate payment of the money, but would allow it to stand over until after the opening of the railway to Colchester, if it would be any accommodation; but the amount of compensation must be at once arranged, and an agreement entered into for completing the purchase.”

The Company made an offer to the plaintiff of £100 per acre for any land taken by them, and desisted, pending these negotiations, from any further digging in East Field. On the 20th of February, 1843, the surveyor of the Company alleged, in a letter to the solicitor of Mr. Tower, that another slip had taken place in the cutting adjoining East Field, and that more of Mr. Tower's land than was shewn in the tracing would be required for the

purpose of making good such slip. The stakes which had been placed by the Eastern Counties Railway Company to mark out the quantity of land required by them in East Field and West Field were forthwith removed by the Company; and immediately after the 20th of February, the Company caused a large number of workmen to enter into the East Field, and to dig the soil thereof, and to deposit the same on the Nag's Head-lane Piece. On the 28th of February, 1843, the bill for an injunction was filed. On the 4th of March, 1843, the surveyor of the Company sent to the solicitor for Mr. Tower the following letter:—

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“Brentwood, 8th March, 1843.

“DEAR SIR,—I have communicated to Mr. Tower the proposal made by you on behalf of the Eastern Counties Railway Company. I am desired, in reply, to inform you that Mr. Tower cannot conceive so large a portion of the East and West Fields as shewn in the tracing can be required for the purpose of the railway, in consequence of the recent slips on this part of the line, and that he apprehends the Company have some other object. Mr. Tower is, besides, very unwilling to part with so much additional land from the East and West Fields, which, in consequence thereof, would be so greatly cut up and deteriorated in value; indeed, the injury to his estate would be greater than was occasioned by the original severance. The proposed compensation is therefore obviously inadequate; and Mr. Tower cannot agree to sell the additional land, 1 acre, 2 roods, 17 perches, unless he is paid the same amount of compensation in proportion for the quantity of land as he received for the 9 acres originally purchased by the Company. Mr. Tower will also require a clause to be inserted in the conveyance, that, in case the Company shall at any time apply the land so taken, or the earth therefrom arising, to any other purpose beneficial to the Company, and

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not necessary for curing the recent slips of the slopes adjoining the fields called the East and West Fields, that then they shall pay him such additional price as either Mr. Stephenson or Mr. Brunel shall consider equivalent to the benefit thereby derived to the Company. It must also be stipulated, that the Company shall pay a proportionate part for the tithe rent-charge upon the land taken, that they shall pay all the expenses already incurred by Mr. Tower in consequence of the proceedings of the Company, as well as all further expenses relating to the sale of the said land, and an apportionate part of the tithe rent-charge, and that they shall remunerate the tenant, who is to continue to pay the present rent during the remainder of his term. As I should be glad to avoid as much expense as possible to the Company, and as the briefs in support of the application for injunction must be delivered on Monday, unless a satisfactory arrangement is made in the meanwhile, I request the favour of an early reply; and I beg to add that this offer, if not accepted, must be considered to be made without prejudice."

In reply to this letter, the secretary of the Eastern Counties Railway Company sent to Mr. Tower's solicitor the following letter:—

" Eastern Counties Railway Office,
 Shoreditch Station,
 London, 9th March, 1843.

" DEAR SIR,—I am desired to acknowledge the receipt of your letter of yesterday's date to Mr. Ponsford. The directors cannot but look on your legal proceedings as unnecessary, and as putting the Company to vexatious expense. It has been their intention, as well known to you and your client, to pay him a full compensation; and his suspicions, which you state, of the Company's having other objects in view than to remedy the slip, are perfectly groundless. The very liberal offer which you have rejected

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is more than the Company would be willing to pay under any compulsory process, and is considerably more than the value of the land, including all damage; and, therefore, they cannot agree to pay at the same rate for the additional land now required as they did for the 9 acres originally purchased. Under the circumstances of the hostile and unnecessary measures which you have adopted, the Company have no alternative but to state that they cannot increase their offer, and that they will not pay any expenses whatever so unjustly put upon them which they can possibly avoid. The land required by them will be still more than that which they have stated to you; and you will be furnished with the particulars of the further additional quantity. The Company will be then ready to pay for the whole land they take, such sum as surveyors mutually chosen may fix. In the meantime, they will stop the operations of taking any further land or doing further injury to your client's property, and will meet your motion should you persist in it, by the fact, that we have been working with your consent, under a promise to settle and pay, which promise we are and have been ready to perform reasonably. Should your client reject the settlement by a surveyor's valuation, the Company can only then proceed in the regular course under the clauses in the public Railway Act of last session, and take the valuation of a jury."

The plaintiff C. T. Tower and his solicitor filed affidavits in support of the allegations in the bill, and Mr. Ponsford, the surveyor of the Company, Mr. Braithwaite, the engineer, and Mr. Walcot, the sub-engineer of the Company, filed affidavits, verifying the correspondence hereinbefore stated, the actual existence of the slip in the railway, and the necessity that immediate steps should have been taken by the Company to remedy the mischief by removing the superincumbent weight of soil. Mr. Ponsford, the surveyor,

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insisted, by his affidavit, that the plaintiffs, by entering into negotiations with the Company as to the price to be paid for the land, had waived the necessity of giving notice to the Board of Trade, as required by 5 & 6 Vict. c. 55, ss. 14 and 15, in respect of such land as the Company had actually entered upon and taken for the prevention of danger to the public safety, and denied that the land was required for any other purpose than the repairing of the slip in East Field, and preventing a slip which it was anticipated would take place in West Field. Mr. Ponsford also alleged, that the Company were willing to have the value of the land ascertained by any fair and indifferent person, and to pay the amount thereof; and that it was the intention of the Company forthwith to apply to the Lords of the Treasury for permission to take the piece of land near Nag's Head-lane, and also all such of the land in East Field as was delineated in a plan annexed to his affidavit, permanently, upon which the Company had already necessarily entered; and also to take the further land in the plan described and delineated, and forming a part of West Field, and further part of East Field, upon which the Company had not yet entered; and to issue their precept for the purpose of impannelling a jury to ascertain the compensation payable to the plaintiffs in respect of the two last-mentioned parcels of land respectively. And that he verily believed, that the whole of the land delineated in the plan was essentially necessary to enable the Company to repair the bank of the cutting, and also to prevent a further slip taking place, and was not required for any other use, intent, or purpose whatever. On the 14th day of March, Mr. Tower's solicitor filed another affidavit, to the effect that the Company were on that day still digging and carrying away the soil in East Field and West Field. On the 18th of March, 1843, the motion for an injunction was made.

For the motion Mr. *Kenny Parker*, and Mr. *J. H. Law*

cited *Innocent v. North Midland Railway Company* (a), *Stone v. Commercial Railway Company* (b), *Frewen v. Lewis* (c), and contended that the Company had not brought themselves within the 5 & 6 Vict. c. 55, ss. 14 and 15.

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For the defendants, Mr. *Roupell* and Mr. *Wood* submitted that plaintiffs had, by their acquiescence, waived the necessity of notice under the last-mentioned act.

The *Vice-Chancellor* expressed an opinion that the defendants had not brought themselves within the terms of the 5 & 6 Vict. c. 55; but declined to grant the injunction, on the ground that the affidavits of the Company shewed it was necessary immediate steps should be taken in order to insure public safety; and, with the consent of the counsel for the Company, he directed the defendants to pay £200 into Court, without prejudice to any question as to the quantity of land which the defendants had then entered or should thereafter enter upon, or as to the amount to be paid by the defendants as purchase-money for the said land, or in respect of compensation for such entry, or any other question in the cause, and the defendants to be at liberty to proceed with their works. On the 20th of September, 1843, the Company completed the purchase from the plaintiffs of 4a. 1r. 4p., and it was agreed between the solicitors for the plaintiffs and defendants that the question of the costs of the suit should be left to the decision of the Court.

This question was argued by the same counsel as were engaged on the application for an injunction, and both sides relied on the facts as hereinbefore stated.

December
 13th.

The VICE-CHANCELLOR.—This is one of those cases in

(a) *Antè*, Vol. 1, 256.

(b) *Id.* 399.

(c) 4 M. & C. 255.

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which the Court is called upon to decide a question of costs, under circumstances in which it is scarcely possible to know whether its decision is right or wrong. Sir John Leach always refused to determine the question of costs only, where the substance of the suit has been arranged between the parties. This Court discourages partial compromises, by which the question of costs is left to be decided, when the matters on which that judgment may materially depend are withdrawn from its consideration; and it is the duty of parties, when they effect compromises, to relieve the Court from this difficulty. It is therefore with reluctance that I decide this question. I cannot give costs against the Company; for although they were wrong in not complying with the terms of the act, (5 & 6 Vict. c. 55), by giving the forty-eight hours' notice, yet the treating by Mr. Tower may be considered as a waiver of that objection; and again, the bill appears to have been filed with undue precipitation, and after only eight days' notice. The only order I can make is, that the £200 be paid out of Court, and that the bill be dismissed without costs.

COURT OF EXCHEQUER.

In Michaelmas Term, 1842.

THE PARRETT NAVIGATION COMPANY v. ROBINS.

1842.
Nov. 14th.

TRESPASS for taking goods of the plaintiffs. Pleas—
 1. Justifying the taking of the goods, on the ground that the plaintiffs were duly fined £1, at a court of sewers for the southern division of the county of Somerset, for not cutting the weeds growing in the bottom of the river Isle, between Muchelney Bridge and Muchelney Lock; 2. That the plaintiffs were duly fined £2 for not cutting the weeds growing in the bottom of the river Parrett, between Thorney Bridge and the southern boundary of the borough of Langport Eastover; 3. That they were duly fined £3 for not cutting the weeds growing in the bottom of the river Parrett, which lies within the borough of Langport Eastover; 4. That they were duly fined £4 for not cutting the weeds growing in the bottom of the river Parrett, between the northern boundary of the borough of Langport Eastover and Hathe.—Replication to all the pleas, that the plaintiffs were not duly fined; on which issue was joined.

The facts were stated under a Judge's order for the opinion of this Court in the following case:—

The rivers Isle and Teo, which have been immemorially navigable, fall into the river Parrett a little above Langport; and this river, which has also been immemorially navigable, runs through Langport and Bridgewater into

By a canal act, (6 & 7 Will. 4, c. ci), a Company were incorporated for the purpose of improving the navigation of the river Parrett, and (by sect. 121) they were empowered to take tolls in respect of the transit or conveyance of goods upon it:—*Held*, in the absence of any express enactment on the subject, that the Company were not charged with any liability not essential to the improvement of the navigation, and, therefore, were not liable to cleanse the river, or clear away weeds, which, though injurious to the adjoining landowners, were found to be beneficial to the navigation.

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the Bristol Channel. These rivers drain a considerable tract of country, and are under the control of the commissioners of sewers for the southern division of the county of Somerset, who cause them to be viewed frequently by their officers, and who present to the Court all nuisances, annoyances, and impediments therein. Weeds grow up from the bottom of the rivers in the spring of the year, and die in the fall. During the time they are growing, the water is buoyed back by them, and after much rain such water inundates the low-lands adjoining; some of these weeds have immemorially been cut at different times of the summer, so as to prevent them being an impediment to the passage of the water. The neighbouring lands are greatly benefited in winter by the floods, and also in some degree in dry summers by the water ponded back by the weeds. The corporation of Langport, who hold lands and receive the rents and profits of them, have the exclusive right of fishery in the river Parrett, both above and below the town of Langport, to the extent of the bounds of the borough of Langport; which right of fishery, together with the lands, they have held prescriptively from the Crown, but not as parcel of or as annexed to the manor; and the Bishop of Bath and Wells, as lord of the adjoining manor of Huish Episcopi, through which the river Parrett runs, has the exclusive right of fishery above the borough of Langport to the extent of his manor. The corporation of Langport have always, out of the rents and profits arising from their lands and otherwise, cut the weeds within their fishery. The weeds have never been cut in the river Parrett above Langport, nor in the river Teo. In the river Isle they have been cut by the occupiers of ancient inclosures, opposite to and to the length of their frontages, as far as the middle of the river. Opposite to the common moors, the occupiers of tenements, to which rights of stackage in the moors belong, have cut specified portions of the weeds, which portions were marked by posts put into

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the ground. Below Langport the weeds in the Parrett, through the parishes of Curry-Rivell, and Aller, the only parishes where it was necessary to cut them, were, from beyond the time of living memory down to the passing of the Poor Law Amendment Act, 4 & 5 Will. 4, c. 76, cut by the overseers of the poor of the respective parishes. These overseers had no lands as overseers, and the expenses were charged in their accounts. Since the passing of the act these expenses have been disallowed by the auditors of the union, and the weeds have remained uncut. In the year 1836, an act 6 & 7 Will. 4, c. ci, local and personal, was passed, intituled "An act for improving the navigation of a portion of the river Parrett, and for making a navigable canal from the said river to Barrington, all in the county of Somerset," under which the Parrett Navigation Company, constituted by that act, have levied the toll thereby authorized to be taken, and have erected several locks across the river, and they have purchased strips of land abutting upon the rivers Isle and Parrett on one side thereof throughout the whole of the navigation, for making a towing-path, and have actually formed and are now using that path. They have also made and completed various improvements in the navigation of the Parrett, and have accelerated and improved the drainage of the neighbouring lands. It would be rather a benefit to the Company, although injurious to the landowners, to leave the weeds uncut.

Fines of £1, £2, and £4, have been imposed upon the Parrett Navigation Company by the court of sewers, for not cutting the weeds in the rivers Isle and Parrett, as follows, viz.:—The fine of £1 for not cutting the weeds in the river Isle; the fine of £2 for not cutting the weeds in that part of the river Parrett which is above Langport; the fine of £3 for not cutting the weeds in that part of the river Parrett which comprises the fishery of the Langport corporation; and the fine of £4 for not cutting the weeds in that

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part of the river Parrett below Langport; the whole of which portions of the rivers are comprised in the Parrett Navigation Act.

On the 22nd of September, 1841, at the sewers' court held at Langport, it was agreed that the opinion of this Court should be taken as to the liability of the Navigation Company to cut these weeds, and the power of the commissioners of sewers to compel them to do so by fine, or any other and what mode, when all the necessary proceedings and the levying of distresses were to be admitted to have been made in due form, so as to bring before the Court the real questions of the liability of the Company to cut the weeds, and the jurisdiction of the commissioners in imposing the fines; which questions were as follows:— As to the fines of £1 and £2, whether the Parrett Navigation Company, or the landowners, or the commissioners of sewers, or all or any two, and which of them jointly, and to what extent, are liable. As to the fine of £3, whether the Parrett Navigation Company, or the Langport corporation, or the landowners, or the commissioners of sewers, or any and which of them, and to what extent, are liable. As to the fine of £4, whether the Parrett Navigation Company alone, or the Parrett Navigation Company and the landowners jointly, and to what extent, or the landowners alone, or the overseers of the poor, or the commissioners of sewers, are so liable. And whether, in the above instances, the commissioners had power to impose fines on the Company, or to compel them in any other and what mode to cut the weeds. And it was agreed, that, in submitting the points for the opinion of the Court, it should be left to the Court, if they should think fit so to do, to mark the liability of the Company, if they should be found to be liable at all, either solely or jointly, by dividing the fines; either party to be at liberty to refer to any of the clauses in the above act.

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The points marked for argument by the plaintiffs were, that they were not subject to the obligation of cutting the weeds growing in the river mentioned in the case; and that, at all events, they were not finable for any omission in cutting them.

By the defendant—That the right given to the plaintiffs, by 6 & 7 Will. 4, c. ci, to demand and receive toll in respect of the conveyance of goods on the rivers Parrett and Ise, was such a beneficial interest in those rivers as to render the plaintiffs liable to the burthen of cleansing and scouring those parts of the two rivers to which the plaintiffs' right extends.

Cowling, for the plaintiffs.—The Company were incorporated for the purpose of making the Parrett a navigable river, and constructing a canal; and that no other objects were contemplated by the legislature is clear from the preamble of the act, (6 & 7 Will. 4, c. ci). By sect. 3, they are required to make, complete, and maintain such improvements in the navigation of the river Parrett as may be necessary to secure a depth of three feet water in some part of the stream throughout the whole course of the said river, &c.; but that casts upon them no obligation to cut the weeds, nor is there any express direction in the act that they are to be so liable. The only obligation is to improve the navigation, for the expense of which sect. 121 empowers them to take tolls. Sect. 73, which obliges the Company to repair the banks of the present river which they may use, does not make them liable to repair such banks as they do not use. They are responsible for damage arising to the lands, if any be caused by their allowing the tidal water to run up the river, which they are empowered to do, under certain restrictions, by sects. 11, 13, and 14. But the act neither expressly nor by implication imposes upon them the burthen of clearing away the

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weeds, which, therefore, remains with the parties who originally had that duty imposed upon them.

Manning, Serjt., contra.—All persons who have power to navigate a river, as they have the benefit of the navigation, so they have the obligation cast upon them to cleanse and scour it. Book of Assize, 37, pl. 10. The plaintiffs here have the benefit of this navigation, and the power of taking toll, therefore they are bound to cleanse and scour the river; and if they fail in doing so, are liable to be fined by the commissioners of sewers, under 23 Hen. 8, c. 5, and that, whether other persons are liable with them or not: Year Book, 32 Edw. 2, fol. 1, pl. 2. *The Case of the Repairs of Bridges*, &c. (a), furnishes a strong authority. It is said there, that "he who hath the land adjoining, ought of common right, without prescription, to scour and cleanse the ditches next to the way to his land; and therewith agreeth the book of 8 Hen. 7, c. 5. But he who hath land adjoining, without prescription, is not bound to repair the way. So of a common river, of common right, all who have ease and passage by it ought to cleanse and scour it; for a common river is as a common street, as it is said in 22 Ass. and 37 Ass. 10. But he who hath land adjoining to the river is not bounden to cleanse the river, unless he hath the benefit of it, *scil.* a toll, or a fishery, or other profit. So here, the Company, having the benefit of the river, are liable to cleanse it: *Warren v. Dix* (b).

Cowling, in reply, cited *The Lancaster Canal Company v. Parnaby* (c), to shew that no common-law liability to cleanse the river was imposed upon the Company.

(a) 13 Rep. 33.

(b) 3 C. & P. 71.

(c) Antè, Vol. 1, p. 696.

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LORD ABINGER, C. B.—I am of opinion that the Court of Sewers cannot enforce these fines on the plaintiffs. It seems to me that the act 6 & 7 Will. 4, c. ci, so far as relates to the river Parrett, was passed to improve the navigation of a portion of that river, and for that purpose gave tolls to the Company of proprietors. They have a right to do whatever is essential for carrying out the purposes of the act, but they are not charged with any liability in respect of matters which are not essential for the improvement of the navigation. It is expressly stated in the case, that it will be for the benefit of the Company to leave the weeds uncut; therefore, even supposing there was any liability at common law for parties who take tolls on a river to cleanse it, still, here the tolls are given for the purposes of the navigation, and the omission complained of is beneficial to the Company. I cannot understand, therefore, how the Company can be liable to a fine for doing only what the legislature has directed them to do.

PARKE, B.—The simple question is, what the act of Parliament requires to be done by the Company, for the toll which it empowers them to take. Now, sect. 121 clearly authorizes them to take toll, not for the purposes of sewerage, but only with the view to render the river navigable. It is their duty, therefore, to do all things which are essential for the proper navigation of the river. That duty they have performed; therefore, on this short ground, it seems to me that the commissioners have no right to impose these fines. With respect to the liability at common law, that can be only to do what is requisite for the navigation; but this is an attempt to impose a fine for omitting to do that, the doing of which would be a detriment to the navigation.

GURNEY, B., concurred.

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ROLFE, B.—The Company have no exclusive right of navigation. Sect. 136 empowers all persons to navigate the river on payment of reasonable toll.

Judgment for the plaintiffs.

COURT OF QUEEN'S BENCH.

In Michaelmas Term, 1842.

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THE QUEEN v. P. BINGHAM, Esquire.

A railway act, 6 & 7 Will. 4, c. cvi, (incorporating the Eastern Counties Railway Company), enacts, s. 36, that the Company shall not be obliged, nor any jury under the act allowed, to receive or take notice of

any complaint for any loss or injury sustained in consequence of the execution of the powers of the act, unless notice in writing shall have been given by the complainant to the Company within six months after the time of such loss or injury. Sect. 41 enacts, that, in case of differences between the Company and owners &c. of property as to the amount of damage done thereto by the Company under the powers of the act, the same shall (when the claim does not exceed £20) be determined by two justices. A subsequent act, 1 & 2 Vict. c. lxxxi, s. 42, in all cases of land occupied by the Company for temporary purposes, enacts, that the compensation for the same shall be ascertained in like manner by the justices, whatever may be the amount claimed:—*Held*, that the notice required by sect. 36 of the first act does not apply to cases before the justices. And therefore, where a justice had dismissed a complaint for want of proof of such notice, the Court granted a mandamus, calling upon him to hear and determine the complaint.

A rule nisi was afterwards obtained, calling upon the Company to shew cause why they should not pay the costs of the above mandamus; but, as it did not appear whether it had been even served on the justice, and he had made no return to it, the Court discharged the rule, on the ground that the application was premature.

to the said S. Emsley, dated 1st of July, 1841, calling upon the directors of the Eastern Counties Railway Company to appear before him to answer the complaint of the said S. Emsley against the said Company, for taking possession of and occupying a certain piece of land belonging to the said S. Emsley, on and from the 23rd of February to the 23rd of November, 1839, and to have the amount of compensation claimed from the said Company by the said S. Emsley, in respect thereof, settled, judged of, and determined by the said P. Bingham; or why the said P. Bingham should not grant a fresh summons upon the complaint of the said S. Emsley, to and for the like purpose and effect, and proceed to hear and determine the same.

It appeared by affidavit, that, in February, 1839, the Company, in pursuance and for the purposes of their acts (6 & 7 Will. 4, c. cvi, and 1 & 2 Vict. c. lxxxi (a)), took possession of the piece of land situate in Suffolk-street,

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(a) The material sections are as follow :—

The act 6 & 7 Will. 4, c. cvi, s. 36, enacts, "that the said Company shall not be obliged, nor shall any jury to be summoned by virtue of this act be allowed, (without the consent of the said Company), to receive or take notice of any complaint to be made by any party for any loss or injury by him sustained, or supposed to be sustained, in consequence of the execution of any of the powers of this act, unless notice in writing, by or on the behalf of the corporation or person making such complaint, stating the nature, extent, and particulars of such loss or injury, and the amount of the compensation claimed in respect thereof, shall have been given by such corporation or person to the said Company ten days before the sum-

moning of such jury, and within the space of six calendar months after the time of such supposed loss or injury having been sustained, or after the sustaining, doing, or committing thereof shall have ceased, so that the said Company shall not be chargeable with or liable to any amount of continuous damage for any time exceeding six years prior to the making of such claim, and giving such notice."

Section 41 enacts, "that, in case any difference shall arise between the said Company and any of the owners or occupiers of the property to be taken, used, or injured for the purposes of this act, as to the amount or value of the damage done by the said Company, their agents, or workmen, to such property in the execution of any of the powers of this act, and such differ-

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Bethnal Green, Middlesex, within 250 yards of the said railway, and occupied the same for temporary purposes until the following November, when they quitted and gave up the land to Emsley, without any notice to quit. That, after the Company had quitted the said land, he made, in the years 1839 and 1840, various applications to the directors for compensation, and on the 14th of May, 1840, served on the directors of the Company a formal notice, claiming the sum of £150, viz. £125 for the occupation of the land, and £25 for temporary damage done to it by the Company during their occupation.

That the Company not having taken any notice of nor replied to the said claim, the said S. Emsley, on the 1st of July, 1841, obtained from Mr. Bingham, one of the police magistrates at Worship-street, being the nearest police court to the site of the said land, the summons re-

ence cannot be adjusted and settled between the said parties, the same shall, in case the amount of damages claimed does not exceed twenty pounds, be ascertained and determined by some two or more justices of the peace for the respective counties aforesaid, who, upon application made to them by both or either of the said parties, shall examine into the matter in dispute, and shall determine and settle the amount of compensation which shall be payable by the said Company."

The 1 & 2 Vict. c. lxxxi, for amending and enlarging the powers of the former, enacts, sect. 42, "that, whenever, under the powers of the said-recited act, the said Company shall have occupied, or shall hereafter occupy any land for temporary purposes, the said Company shall pay to the owner and

occupier of the said land for the time being full compensation for the occupation of the same, and for any temporary damage such owner and occupier may sustain in consequence of the occupation of the same, the amount of which compensation, whether the same shall exceed or be less than twenty pounds, shall be settled, judged of, and determined from time to time, as such compensation shall be claimed, by any two justices acting for the district in which such land may lie, and shall be recovered in the same manner as damages to a small amount are directed to be recovered by the said-recited act; provided always, that the permanent injury or damage (if any) which may be done to the said lands shall be settled as directed by the said-recited act."

cited in the rule. That this summons was served at the office of the secretary of the Company, on the 3rd of July, and came on to be heard before the said P. Bingham, at the said police court, on the 12th, when counsel attended for the said S. Emsley and for the Company. That the said S. Emsley was prepared with due evidence in his behalf to prove the occupation of the land, the amount of compensation to which he was entitled, his title to the land, and the disagreement between him and the Company as to the amount of compensation, and the notice of the 14th of May, 1841, and summons of the 1st of July, 1841, aforesaid: whereupon it was objected by the Company, that no notice of the said S. Emsley's claim, loss, or injury, and of the nature, particulars, and extent thereof, and the amount of compensation claimed, had been given to the Company within six calendar months of the time when the Company quitted the said land, and that such notice was required by the said acts of Parliament to be proved, before the magistrate could entertain the claim: whereupon the said P. Bingham decided, that such notice within such period of six calendar months was necessary, and that the application of the said S. Emsley was not in accordance with the 36th section of the said act, (6 & 7 Will. 4, c. cvi), but that the same was made too late, and dismissed the claim of the said S. Emsley for want of proof of such notice. That being afterwards provided with the means of proving a notice of the 18th of December, 1839, the said S. Emsley again applied to Mr. Bingham for another summons, and informed him of the fact of his being prepared to prove the notice within six calendar months, for want of which the previous application was dismissed, but the magistrate refused to grant a fresh summons.

A copy of the rule nisi was served upon Mr. Bingham, who stated that he should not oppose the rule, nor instruct

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any one to appear in his behalf. A copy was also served upon the secretary of the Company at their office.

The rule was enlarged by consent, from time to time, until Michaelmas Term, 1842, when Sir *W. Follett*, Solicitor-General, and *E. James* shewed cause against it, and Sir *F. Pollock*, Attorney-General, and *C. Jones*, were heard in support of it. The Court made the rule for a mandamus absolute, on the ground that the claim as to notice does not apply to cases before the magistrates, and a mandamus issued accordingly.

In Hilary Term, 1848, *C. Jones* obtained a rule nisi, upon reading the above affidavits and rules of Court, calling upon the Eastern Counties Railway Company to shew cause why they should not pay to the said *S. Emsley*, or his attorney, the costs of and occasioned by the application for the writ of mandamus issued in the said prosecution, and of the said writ, and of that application.

E. James shewed cause (a).—The affidavits do not disclose what has been the result of the former proceedings, whether *Emsley* has established any claim for compensation against the Railway Company, or not. The Court ought to be made acquainted with all the facts of the case, and to know whether the claim has been successfully prosecuted before granting these costs, which are discretionary. For anything that appears on the affidavits, the claim may have been totally without foundation, and there may still be a return to the mandamus by the justice.

Sir *F. Pollock*, Attorney-General, and *Crouch*, contra.—The costs resulting from removing an impediment to justice ought not to depend upon the success of the proceed-

(a) Before Lord *Denman*, C. J., *Williams*, *Coleridge*, and *Wightman*, Ja.

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ings: when a party is entitled to the interposition of the law, he is entitled to his costs; and it is the general practice to grant them whenever an inferior Court refuses to hear and adjudicate upon a case properly within its jurisdiction, and the party is compelled to come to this Court for a mandamus. And the application is the subject of a separate motion: *Rex v. The Commissioners of the Thames and Isis Navigation* (a). (James mentioned *Regina v. The Commissioners of the Thames and Isis Navigation* (b), where the Court refused to make costs the subject of a separate application). That case is inapplicable, for here the justice did not oppose the issuing of the mandamus, but left the Company to do so.

LORD DENMAN, C. J.—This application has been made too soon. The affidavits do not state that any proceedings have taken place upon the mandamus. It does not appear that it has been obeyed or even served. It is possible that there may be a return made to it justifying the refusal to hear (c).

Rule discharged, without costs.

(a) 5 A. & E. 804.

(b) 8 A. & E. 901, n.

(c) See 1 Will. 4, c. 21, s. 6, post, p. 410.

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THE QUEEN v. THE SHERIFF OF MIDDLESEX

In re WALKER v. THE LONDON AND BLACKWALL RAILWAY COMPANY.

By a railway act (6 & 7 Will. 4, c. cxxiii), a Company are empowered to take lands, &c., giving compensation to the owners, such compensation upon disagreement to be settled by a jury, to be summoned by the Company's warrant to the sheriff. Sect.

50 enacts, that, if any person shall be applied to by the Company to sell part of any house, &c., and shall by notice signify his desire to sell the whole, he shall not be compelled to sell less. By sect. 51, if any dwelling-house situate within fifty feet of the railway shall be deteriorated by it, the Company are required to treat for the purchase thereof, and for compensation for damage occasioned by taking it; Provided that the Company shall not be compellable to purchase any portion of any dwelling-house &c., which portion is situate at a greater distance than fifty feet from the railway; Provided also, that the Company, when called upon to take part of such dwelling-house, &c., may at their option take the whole. The 2 & 3 Vict. c. xcv, s. 22, in case the Company, upon request, shall not, within twenty-one days, issue their warrant for a jury, empowers the claimant to send a request to the sheriff for that purpose.

The owner of a dwelling-house, the greater part of which was within fifty feet of the railway, and the rest beyond it, called upon the Company to purchase the whole, in a notice which stated that the premises were within fifty feet of the railway, and were deteriorated by it, and claimed compensation. This notice being disregarded, he sent another notice, requiring them to summon a jury, which being also disregarded, he sent a precept to the sheriff, stating that the premises were within fifty feet of the railway, and deteriorated by it, reciting the above notices, and requiring the sheriff to summon a jury to inquire whether the property was deteriorated by the railway, and whether he was entitled under the statutes to have it purchased, and compensation made by the Company; and, if the jury should so find, to assess compensation.

On the inquiry, it appearing in evidence that part of the house was not within the fifty feet, the sheriff on that ground refused to hear further evidence, or to proceed with the inquiry, and directed the jury to find that the claimant was not entitled to have his property purchased by the Company. Upon motion for a mandamus to the sheriff to execute the precept:—

Held, that a house so circumstanced was properly called a house within fifty feet of the railway, and that the Company were bound to purchase the whole of it. *And* that the precept, although improperly raising as a question for the jury the fact of the house being within the prescribed distance, (without which they had no jurisdiction to inquire), was sufficient, and the Court issued the mandamus.

A rule was afterwards obtained, calling upon the Company to shew cause why they should not pay the costs of the mandamus:—*Held*, that, as the necessity for the application had been caused by the mistake of the sheriff in his judicial capacity, the party defending his ruling were not liable to pay costs.

several acts of Parliament passed for making the said railway (a).

(a) The sections of the London and Blackwall Railway Acts material to this and the next case are as follows :—

The 6 & 7 Will. 4, c. cxxiii, “for making a railway from the Minories to Blackwall,” enacts—

Sect. 11. “That it shall be lawful for the said Company to treat and agree for the purchase of any lands authorized to be taken and used by them as aforesaid, and of any subsisting leases, terms, estates, and interests therein, and charges thereon, or such of them, or such parts thereof as the said Company shall think proper.”

Sect. 21. “That all and every body or bodies, politic, corporate, or collegiate, trustee or trustees, and other person or persons hereinbefore capacitated to contract for, sell, and convey any such tenements or hereditaments as aforesaid, or any share or shares, estate or estates, interest or interests therein, may accept and receive such satisfaction or recompense for the value thereof; and such body or bodies, trustee or trustees, person or persons, owner or owners, and also any tenant or tenants for a year, or from year to year, or at will, or other occupier or occupiers of any such premises, entitled to any compensation for such good-will or improvements as shall be lost, and for tenants’ fixtures, and for such injury or damage as shall be sustained on account of the execution of this act, or in anywise relating thereto, may accept and receive such sum of money in respect

thereof, as shall be agreed upon between them, respectively, and the said Company; and in case the said Company and the said parties interested &c. cannot or do not agree as to the amount or value of such satisfaction, recompense, or compensation, the same respectively shall be ascertained and settled by a jury in manner hereinafter directed.”

Sect. 22. “And for settling all differences which may arise between the said Company and the several owners and occupiers of, or persons interested in any lands which shall or may be taken, used, damaged, or injuriously affected by the execution of any of the powers hereby granted, be it further enacted, that, if any person, corporation, or trustee, so interested or entitled, and capacitated to sell, agree, convey, or release as aforesaid, shall not agree with the said Company as to the amount of such purchase-money or satisfaction, recompense, or other compensation as aforesaid, or, if any of the parties entitled to receive such purchase-money, &c. shall refuse to accept such purchase-money, &c. as shall be offered by the said Company, and shall give notice thereof in writing to the said Company within twenty days next after such offer shall have been made, and the party giving such notice shall therein request that the matter in dispute may be submitted to the determination of a jury, or, if any such parties as aforesaid shall, for the space of twenty-one days next after notice

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It appeared from the affidavits that, at the time of making the railway in 1840, Mr. Walker was the owner and

in writing shall have been given to the clerk, agent, or principal officer of any such corporation, or to any of such trustees or persons respectively, or left at his last or usual place of abode, or with the tenant or occupier of any lands required for the purposes of this act, neglect or refuse to treat or shall not agree with the said Company for the sale, conveyance, and release of their respective estates and interests, or the respective estates or interests which they respectively are hereby capacitated to convey therein, or shall, by reason of absence, be prevented from treating, or shall, by reason of any impediment or disability, whether provided for by this act or not, be incapable of making such agreement, conveyance, or release, as shall be necessary or expedient for enabling the Company to take such lands, or to proceed in making the said railway, and the other works aforesaid, or shall not disclose and prove the state of the title to the premises of which they respectively may be in possession, or of the share, interest, or charges which they may claim to be entitled unto, or interested in, or in any other case where agreement for compensation for damages incurred in the execution of this act, or for the purchase of lands required for the purposes of this act, cannot be made, then and in every such case the said Company shall, and they are hereby required from time to time to issue a warrant, either under their common seal, or under the hands and seals of three, at least,

of the directors of the said Company, to the sheriff or sheriffs of the county or city where the lands in question shall be situate, &c., and if such sheriff or sheriffs, or their under-sheriff or under-sheriffs, &c., respectively, shall be a shareholder or shareholders in the said Company, or enjoy any place of trust or profit under the said Company, or shall be in anywise interested in the matters in question, then, to any of the coroners of the said county, city, &c., not interested as aforesaid, or, if all the coroners shall be so interested as aforesaid, then to some person living within the said county, &c., and free from personal disability, who shall have filled the said office of sheriff, &c. within the said county, (a person having more recently served either office being preferred), commanding such sheriff or sheriffs, or other person to impanel, summon, and return, and the said sheriff, &c. is and are hereby accordingly empowered and required to impanel, summon, and return a jury of at least forty-eight sufficient and indifferent men, qualified according to the laws of this realm to serve on juries, for trials of issues in his Majesty's Courts of record at Westminster; and the persons so to be impanelled, &c. are hereby required to appear before the said sheriff, under-sheriff, &c., and to attend from day to day until duly discharged; and out of such persons so to be impanelled, &c., a jury of twelve men shall be drawn by the said sheriff, under-sheriff,

occupier of a house in the parish of St. George's in the East; that the railway passed at the back of his premises,

&c., in such manner as juries for the trials of issues joined in his Majesty's courts of record at Westminster are by law directed to be drawn, &c.; and the said sheriff, under-sheriff, &c. is hereby empowered and required, on request in writing by either party, to summon before him all persons who shall be thought necessary to be examined as witnesses touching the matter in question, and may authorize or order the said jury, or any six or more of them, to view the place or matter of controversy, and such jury shall, upon their oaths, or, being Quakers, upon their affirmations, (which oaths and affirmations, as well as the oaths and affirmations of all such persons as shall be called upon to give evidence, the said sheriff, under-sheriff, &c., is hereby empowered and required to administer), inquire of, and assess, and give a verdict for the sum of money to be paid for the purchase of such lands, except for such interest therein as shall have been of right purchased by the said Company from any other persons, and also the sum of money to be paid by way of satisfaction, recompense, or compensation, for good-will, improvements, tenants' fixtures, or for any injury or damage whatsoever, which shall, before that time, have been done or sustained as aforesaid, and for the future, temporary, or perpetual, or for any recurring damages to be so done or sustained as aforesaid, and the cause and occasion of which shall have been in part only obvi-

ated, removed, or repaired by the said Company, and which cannot or will not be further obviated, removed, or repaired by them, which satisfaction, recompense, or compensation for such damage or loss shall be inquired into, and assessed separately and distinctly from the value of the land so to be taken or used as aforesaid, and the said sheriff, under-sheriff, &c. shall, accordingly, give judgment for such purchase-money, satisfaction, recompense, or compensation, as shall be assessed by such jury, which said verdict, and the judgment thereon to be pronounced as aforesaid, shall be binding and conclusive, to all intents and purposes, upon all persons and corporations whatsoever," &c.

Sect. 24. "That the said verdicts and judgments, being first signed by the said sheriff, under-sheriff, &c., presiding at the taking of such verdict, and pronouncing such judgment respectively, &c., shall be kept by the clerk of the peace for the county, &c. in which the matter in dispute shall have arisen, among the records of the quarter sessions of such county, &c., and shall be deemed records to all intents and purposes," &c.

Sect. 27. "That, in every case in which the verdict of a jury summoned as aforesaid shall be given for the same or a greater sum than shall have been previously offered by the said Company, for the purchase of any lands to be used or taken by them, for the purposes of this act, or as compensation for

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which were within fifty feet of the railway, and that, from the proximity of the railway, his house was deteriorated in

any damage or loss which may happen or arise in the execution of any of the powers hereby granted, all the costs, charges, and expenses of summoning such jury, and the expenses of witnesses, shall be defrayed by the said Company; and such costs, charges, and expenses shall be settled and determined by the said sheriff, undersheriff, &c.; and in case such costs, &c. shall not be paid to the party entitled to receive the same within ten days after the same shall have been demanded, then the same shall and may be levied and recovered by distress and sale of any goods and chattels of the said Company, under a warrant to be issued for that purpose by any justice of the peace for the county, &c. wherein such inquisition shall be held, not interested in the matter in question; which warrant such justice is hereby authorized and required to issue, under his hand and seal, on application made to him for that purpose by any party entitled to receive such costs, charges, and expenses," &c.

Sect. 28 provides, "that notice of the nature, extent and particulars of the loss and injury, and of the compensation claimed, shall be given ten days before the summoning of the jury, and within six months after the injury done."

Sect. 50. "That, if any person or corporation, by this act authorized to sell and convey any lands, shall be applied to, by or on behalf of the Company, to treat for, sell, dispose of, or convey any part of

any house, garden, yard, warehouse, building, or manufactory, in the actual occupation of one person, or several persons jointly, and shall, by notice in writing, to be left with the secretary, &c. of the Company, within twenty-one days after such application, signify his inclination or desire to treat for, sell, dispose of, and convey the whole of such house, &c.; and if it shall happen, that the said Company shall not think proper, or be willing to purchase the whole of such house, &c., then, and in every such case, nothing in this act contained shall extend to compel such person, &c. to sell, dispose of, or convey, or to authorize the said Company to take, or use, part only, or less than the whole of such house, &c., anything herein contained to the contrary thereof in any wise notwithstanding."

Sect. 51, reciting, "that the said railway is intended to pass through and along divers streets, lanes, and other public thoroughfares, in the parish of (amongst others) St. George's in the East, and the hamlet of Radcliffe, and also close to or adjoining divers dwelling-houses, or shops, in the said parishes and hamlet; and it may happen, by reason of the construction thereof, that the said dwelling-houses, or shops, may be greatly deteriorated in value," enacts, "that, in case any such dwelling-houses, or shops, which shall be situated within fifty feet from the said railway, shall be deteriorated in value, and the owner

value; that he was willing that the Company should purchase his dwelling-house and premises, and accordingly

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and owners, lessee or lessees, of any such dwelling-houses or shops, within the said parishes, or hamlet, or either of them, shall, by notice in writing, to be left at the office of the said Company, require the said Company to purchase the same, it shall be lawful for the said Company, and they are hereby required, within thirty days after the service of such notice, to treat for the purchase of the dwelling-houses or shops mentioned in such notice, and for the compensation, recompense, or satisfaction, to be made to him, or them, for any loss, damage, or injury, in respect of any good-will, tenant's fixtures, improvements, or otherwise occasioned by the taking thereof; and in case the party so giving such notice and the said Company shall not agree as to the value of such dwelling-houses or shops, or as to the amount or value of the satisfaction, recompense, or compensation, to be paid for such good-will, improvements, tenant's fixtures, or otherwise, then the amount of such satisfaction, recompense, or compensation, shall be ascertained and settled by the verdict of a jury, in the manner hereinbefore described for ascertaining and settling the value or recompense for other lands, tenements, hereditaments, and premises, to be taken or purchased for the purposes of this act: Provided always, that no party shall be entitled to receive any compensa-

tion under the above enactment, unless the jury, to whom it shall be referred to ascertain the amount thereof, shall by their verdict determine that the property, in respect of which the same is claimed, has been deteriorated in value by the construction of the said railway: Provided also, that no party shall be entitled to claim any such compensation, nor shall the Company be compellable to purchase any such property as aforesaid, after the period of twelve months from the opening of the said railway to the public: *Provided* always, that in no case shall the said Company be compellable to purchase any portion of any dwelling-house or shop, which portion is situate *at a greater distance than fifty feet* from the said railway: *Provided* always, that the said Company, whenever called on to take part of such dwelling-houses or shops, as aforesaid, may, *at their option*, take the whole, subject to payment of the compensation hereinbefore mentioned.

The 2 & 3 Vict. c. xcv, extends the provisions of the former act, and provides:—

Sect. 18. "That in all cases where the verdict of a jury, summoned as by the first-recited act (6 & 7 Will. 4, c. cxliii, s. 22) directed, shall be given for the same, or for a greater sum than shall have been previously offered by the said Company for the purchase of any lands to be used or taken by them,

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caused the following notice to be served on the Company on the 8rd of April, 1841 :—

“To the Directors of the London and Blackwall Railway Company.

“Take notice, that I, the undersigned Samuel Walker, do hereby require you, the said Company, to purchase of me all that leasehold estate and premises, situate and being in the New Road, in the parish of St. George in the East, in the county of Middlesex, known by the name or sign of the Duke of Cumberland’s Head public-house, now in the possession of me, the said S. W., held for a

for the purposes of the said-recited act or this act, or as compensation for any damage or loss which may happen or arise, in the execution of any of the powers thereof, the expenses of instructing, and the reasonable fees of counsel, not exceeding two in number, for attending the inquiry before such jury, and the reasonable expenses of one surveyor, which may have been paid by the party with whom the said Company may be in dispute, shall be paid by the said Company; and the amount of such fees shall be settled and determined by the sheriff, under-sheriff, &c., in like manner as the costs of summoning such jury, and other expenses payable by the said Company, but upon the same scale of allowance as may for the time being be adopted or allowed by the taxing officers of her Majesty’s Courts of Record at Westminster.”

Sect. 22. “That in all cases of

dispute between the Company and the parties claiming compensation from the Company, under the provisions of the above-recited acts and the present act, wherein the Company do not, upon request made by such party or parties, to submit the matter in dispute to the determination of a jury, within the space of twenty-one days issue their warrant, according to the regulations of the aforesaid recited acts, for the impannelling and summoning of a jury, then it shall and may be lawful for the party so having given notice, himself to send a request in writing to the sheriff, or sheriffs, or under-sheriff’s bailiff, or his under-bailiff, respectively, according to the tenour of the above-recited act; and the sheriff, &c., so mentioned in the above-recited act, shall summon and impanel a jury, and proceed, as in the manner prescribed in the above-recited act, upon the issuing of the warrant of the Company.”

term of thirty-one years from the 25th day of December, 1838, at the rent of 52*l.* 10*s.* per annum. And further take notice, that the premises before mentioned are situate within fifty feet of the said railway; and that I require the sum of £4000, as compensation-money for the lease and good-will of the said premises and the trade thereof, and the sum of £500 compensation-money for the loss to be sustained by the sale of furniture, removal of stock, and other incidental expenses; the house and trade fixtures to be taken at a fair valuation in the usual way, to be paid for by the said Company, in addition to the said sums above claimed in pursuance of the powers contained in their acts. Dated, &c.

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“(Signed) S. WALKER.”

That no notice having been taken of the above claim, a request, signed by S. Walker, was, on the 5th of June, 1841, left at the office of the Company, in pursuance of the statute, calling upon them to issue their warrant within twenty-one days to the sheriff to summon, &c., a jury, to determine whether he was entitled under the statutes to have the said house purchased and compensation made as before demanded, and to assess the sums to be paid, giving particulars of his claim, as before. That the Company having also disregarded the above request, the following precept was served upon the sheriff of Middlesex, pursuant to the statutes:—

“Whereas I am the owner and lessee, for a term of thirty-one years, from &c., of the dwelling-house now used and occupied by me as a public-house, called &c., which said dwelling-house, or public-house, is situate in the New Road, &c. (as before), within fifty feet of the London and Blackwall Railway, and has been and is deteriorated in value, by reason of the construction of the

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said railway. And whereas," &c. (reciting the claim and notice). "Now, I do hereby require you, the said sheriff, to impanel, summon, and return a jury, to inquire whether the said property, in respect of which the said claim has been so made by me upon the said Company, has been and is deteriorated in value, by reason of the construction of the said railway, and whether I am entitled, according to the form of the statutes, &c., to have the said property purchased of me by the said Company, and to have such compensation made to me in respect thereof as aforesaid, according to my said claim in that behalf: and if the jury shall so find them, they shall by their verdict determine and declare that the said property hath been deteriorated in value by the construction of the said railway, and shall also, by their said verdict, assess and determine the amount of purchase-money, compensation, &c."

That notice of this precept was given to the Company; and on the 28th of August, a jury was impanelled at the sheriff's office before the under-sheriff, in pursuance of the precept.

That witnesses were called who proved the situation of the dwelling-house and premises, and their proximity to the railway; that the whole of the dwelling-house was not within fifty feet of the railway, about thirty-one feet eight inches being within, and about thirteen feet beyond the fifty feet; that the house and premises could not be divided, and if divided, the remaining thirteen feet would be of no value to the proprietor. (An affidavit of a surveyor to these facts accompanied those on which the rule was obtained).

That it was then objected by the counsel for the Company, that the sheriff had no jurisdiction, inasmuch as the whole of the premises were not within the fifty feet; whereupon the under-sheriff refused to receive further evidence,

or to proceed with the inquiry, on that ground, and directed the jury to find that the claimant was not entitled to have his property purchased by the Company.

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Sir *W. Follett*, Solicitor-General, shewed cause (a).—The demand in this case was too large. Instead of requiring the whole of the premises to be taken, it should have been for that part only within fifty feet of the railway. In such cases the 51st section gives the Company the option of taking the whole, but they are not compellable to do so: *Regina v. The London and Greenwich Railway Company* (b).

Sir *F. Pollock*, Attorney-General, contra.—The Company are compellable to take the part within the fifty feet, and it was not necessary that the notice should define how much was within that distance, and claim only for that. That was a question for the jury to determine. [*Patterson*, J.—If you had only required them to take the portion within the fifty feet, they might have agreed.] The jury would probably have found that the whole house was actually within the distance; and the proviso, having been introduced by the Company into the acts for their own benefit, must be construed most strictly against them.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.—This was an application for a mandamus to the sheriff of the county of Middlesex and his under-sheriff, to command them to proceed to execute a precept or request in writing, whereby the sheriff was required to impanel, summon, and return a jury, for the purpose of determining certain disputes between Mr. Samuel Walker and the Company. The fact is, that the sheriff had sum-

(a) June 9th, before Lord Denman, C. J., *Patterson*, *Williams*, and *Coleridge*, *Ja.*
(b) *Antè*, p.138.

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moned a jury; but was of opinion, when the precept was openly read, that it did not authorize him to take their verdict upon the amount of compensation claimed in respect of a public-house, the intended subject of inquiry. The claimant in effect appeals to us against the decision, and if it has been erroneous, he has been deprived of the right conferred upon him by law and may now compel execution of the precept.

The claim is preferred under the 51st section of the act for constituting this Company (his Lordship read the section). Four provisoes are added, one imposing a limitation of the time, the other three connected perhaps in some measure with the present argument, and which, therefore, ought to be considered and stated here. The first of these is, that no party shall be entitled to receive compensation, unless the jury shall, by their verdict, determine that the property has been deteriorated in value by the construction of the railway. The second, that the Company shall in no case be compellable to purchase any portion of any dwelling-house or shop, which portion is situate at a greater distance than fifty feet from the railway. The third, that the Company, whenever called upon to take part of such dwelling-house or shop, may, at their option, take the whole, subject to the payment of the compensation hereinbefore mentioned. The same remedy is, therefore, given to the owner of a house situate within fifty feet from the railway, as to the owner of lands or tenements taken or purchased by the Company. That remedy afforded by the 22nd section is, for the Company to issue their warrant to the sheriff for the summoning of a jury, who are to assess and give a verdict for the purchase-money, and also the sum to be paid by way of satisfaction, recompense, or compensation, for good-will, &c., or for all damages sustained or to be sustained by the Company's acts. The 28th section provides, that notice in writing of the nature, extent, and particulars of the loss

or injury, and of the compensation claimed, shall be given to the Company, by the person complaining, ten days before the summoning of the jury, and within six months after the supposed injury shall have been sustained. There is also a provision in section 50, that if any owner shall be applied to by the Company, to sell any part of any house, &c., and shall, by notice in writing to be left with the Company, within twenty-one days after such application, signify a desire to sell the whole, the Company shall not be authorized to compel him to sell such part, but shall be bound to purchase the whole.

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The position of these parties is now to be considered. The claimant is the owner of the lease of a public-house, which, as he says, is situate within fifty feet of the railway. After submitting his claim to the Company, who paid no attention to it, he required them to issue their warrant to the sheriff, in order to inquire whether the said property has been, and is deteriorated in value, by reason of the construction of the railway, and whether he is entitled to have the same property purchased of him by the said Company, and have such compensation as therein mentioned; and he adds, "If I am found so entitled, then the jury are to assess the compensation-money." On the jury being assembled, the learned counsel for the Company objected to all evidence of value or deterioration of the premises, on the ground that the entirety of them was not within fifty feet, it appearing that the greater part of the house was within that distance. The under-sheriff allowed the objection, and nothing was done.

We are now to consider whether that objection was well founded. It appears to us that any house, of which a very large proportion is within fifty feet, ought to be called a house within fifty feet. This would be so thought by a jury, if called upon to pronounce a verdict upon such an issue. In the absence of express words in the act to

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decide it, there is strong reason for holding the Company to the rule of construing the words of parties most against themselves. The proceedings of the Company may, according to the admission of their own act, be so injurious to houses so situated, as to call for the remedy which it provides; and although the description is not perfect, there are pretty clear indications of the intention of the legislature. The compensation must be obtained through the medium of a verdict if the parties do not agree, and must be ascertained and settled as in purchases; and, by the clause I have just read, no owner of a house which is required to be purchased by the Company, is bound to part with a portion of it only. If they take any part of a house, they may be compelled to purchase the whole of it. If, then, they come within fifty feet of a house, and thereby deteriorate that house in value, the compensation must be settled in the same manner as if the whole house had been taken, at the owner's option. The Company have also an option. They are in no case compellable to purchase any portion of a house, which portion is more than that distance from their railway; and whenever called on to take a part, they may, at their option, have the whole, if they prefer it, subject to compensation. From these words an argument is deduced, that the Company, although free to take the whole house, are not compellable to do so; but we do not think that that inference is just. That proviso seems, indeed, to be framed upon the erroneous supposition, that the act had given power to the owner to compel the purchase of a part of a house, and then had cut down that power by giving the Company the option; but from such a mistake we cannot reasonably infer that the Company were intended to be free to buy the whole, or part, as they thought proper, when it is plain, that the purchasing of part might be ruinous to the whole; and when, in the analogous case of taking and purchasing a house under the

50th section, the option of parting with the whole is given to the owner, if a part only should be required by the Company. The claimant's requisition to the Company appears to have put forward his claim correctly, as, after giving them information of his term and interest in the premises, and stating them to be situate within fifty feet of the railway, it requires a certain sum as the price of the house, and another sum for compensation in respect of loss and damage. The precept is different; for though it describes the house as standing within the distance, it refers that question to the opinion of the jury, who possess no jurisdiction, if it be not in fact and in law within that distance, but who are bound by the act to declare whether the property is deteriorated, and what ought to be paid if it is within that distance, although no tribunal for determining that question. But although this point may have been improperly raised, there is no reason for depriving the complainant of the compensation, which he claimed correctly, for the value of that house, if that house stands at such a distance as to found a right to compensation.

We are, therefore, of opinion, for these reasons, that the under-sheriff was wrong, and that the rule must be made absolute.

Rule absolute (a).

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(a) THE QUEEN v. THE LONDON AND BLACKWALL RAILWAY COMPANY.

1843.
November 24.

In the following Term, *E. James* obtained a rule nisi for a mandamus to the London and Blackwall Railway Company, calling upon them to pay to the prosecutor, or his attorney, the costs of moving for and making absolute the above rule for the mandamus, and the costs of the writ and application.

Costs of the above rule, being occasioned by the mistake of the sheriff, refused.

Sir *W. Follett*, Solicitor-General, shewed cause.—The Court will not compel the Company to pay costs, as the mistake arose from the misdirection of the judge: *Regina v. Bingham*, antè p. 390; besides the Company are not before the Court, the rule for the mandamus having been

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made absolute, not against them, but against the sheriff; the discretion of the Court as to allowing costs, given by the 1 Will. 4, c. 21, s. 6 (a), is only between the parties.

Sir *F. Pollock*, Attorney-General, and *E. James* contra.—In *Regina v. Bingham* it was not decided that the Court would not give costs, but that the application was premature. The Company are the real parties in this case; the costs were incurred in consequence of their refusal to summon a jury, and the statute authorizes the extension of the discretion to those who are directly or indirectly parties.

Lord DENMAN, C. J.—It is unnecessary to consider whether the Company are or are not a party, or whether this case is within the 1 Will. 4, c. 21, s. 6. The case must fall under the general rule, that where a judge makes a mistake, the parties who come to defend his ruling, which they are bound to suppose correct, do not pay costs.

WILLIAMS, COLERIDGE, and WIGHTMAN, Js., concurred.

Rule discharged.

(a) Which enacts, that “in all cases of application for any writ of mandamus whatsoever, the costs of such application, whether the writ shall be granted or refused, and also the costs of the writ, if the same shall be issued and obeyed, shall be in the discretion of the Court, and the Court is hereby authorized to order and direct by whom and to whom the same shall be paid.”

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COURT OF COMMON PLEAS.

In Hilary Term, 1843.

CORREGAL v. THE LONDON AND BLACKWALL RAILWAY COMPANY. Jan. 28.

DEBT. The declaration stated that the London and Blackwall Railway, constructed under the powers of certain By a railway act (6 & 7 Will. 4, c. cxliii), em-

powering a Company to take lands &c., it is provided (sect. 22) that, in case of differences between them and the owners of lands taken or damaged, the Company shall issue a warrant to the sheriff, and if such sheriff shall be a shareholder in the Company, or otherwise interested, then to the coroner, to impanel a jury to inquire of, assess, and give a verdict for the sum to be paid for the purchase of such lands, and also the sum to be paid for compensation for good-will, &c., or any injury or damage sustained on account of the execution of the act, such satisfaction to be assessed separately and distinctly from the value of the lands. By sect. 27 it is provided, that in case a verdict shall be given for the same, or a greater sum than that offered by the Company, they shall pay all the costs, &c., of the inquisition, to be settled by the sheriff, &c., and to be recovered by distress. The 2 & 3 Vict. c. xcv, s. 22, enacts, that if the Company do not within twenty-one days after request issue their warrant for a jury, it shall be lawful for the claimant to send a request in writing to the sheriff for that purpose, who shall thereupon summon and impanel a jury, and proceed in the manner prescribed by the former act upon the issuing of the warrant by the Company.

In an action of debt, the declaration stated the construction of the railway and deterioration of the plaintiff's house by it; that he gave notice to the Company to purchase it, but that they did not treat with him for the purchase, nor for compensation for damages, &c., nor agree as to the value of the house or amount of compensation, that thereupon he requested them to issue their warrant for a jury, but that they did not comply with his request; whereupon he requested the sheriff of Middlesex to summon a jury, to assess the sum to be paid for the purchase of his property and for compensation. That an inquisition was taken in pursuance of the said request before T. F. and M. G., Esqrs., then being sheriff of Middlesex; that a jury were impanelled and sworn; and that the plaintiff and the Company appeared by their counsel. That the jury found that the house was deteriorated by the railway, and gave a verdict for £250, to be paid to the plaintiff by the Company for the purchase of his interest, and also by way of compensation for damage, &c.; and that the sheriff gave judgment for the sum of £250 accordingly. That the verdict and judgment signed by the sheriff were deposited and still remained amongst the records of the quarter sessions. Allegation, that the plaintiff was willing to convey, &c., but that the Company, though requested, had not paid the £250, or any part thereof. There was also a second count for the costs of the inquisition.

Pleas: 1. That T. F. Esq., was a shareholder in the Company, and therefore that the inquisition was void. 2. That the plaintiff adduced evidence, and the jury gave a verdict for the £250, not only for damage occasioned by the taking of the house, but also for damage occasioned thereto by reason of the construction of the railway:—*Held*, on demurrer, 1. That the objection that one of the persons constituting the office of sheriff was interested (if applicable to the case of a warrant issued by the Company) did not affect proceedings instituted by the claimant under the 2 & 3 Vict. c. xcv, s. 22, and that even if the proceedings were voidable, the Company had waived the objection by appearing and taking part in the inquisition. 2. That the evidence objected to, being applicable to the question of the deterioration of the house, which was essential to the jurisdiction of the jury, was admissible. 3. That the provision of the 6 & 7 Will. 4, c. cxliii, s. 22, as to the separate assessment of damages, is directory only. 4. That the provision as to costs, under s. 27, of the first act, does not apply to proceedings instituted by the claimant under s. 22 of the last.

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acts (6 & 7 Will. 4, c. cxxiii, and 2 & 3 Vict. c. xcvi) (a), was first opened to the public, 6th of July, 1840, and that the plaintiff on the 24th of October, 1840, was the lessee for a certain term of years, then next and still unexpired, to wit, for a term &c., from &c., of a certain dwelling-house, situate at &c., in the parish of St. George, in the county of Middlesex, and within fifty feet from the railway, and by reason of the construction of the railway, the dwelling-house and the estate, interest, and property of the plaintiff therein as such lessee were then, to wit, on &c., greatly deteriorated in value, and thereupon the plaintiff so being &c., did, within the period of twelve months from the opening of the railway, to wit, on &c., by notice in writing, bearing date &c., and left at the office of the Company, to wit, on &c., require the Company to purchase his the plaintiff's estate, interest, and property in the dwelling-house whereof he was so lessee and interested as aforesaid, and thereby then gave the Company notice that he was ready to treat for the sale of the same to the Company, according to the provisions of the acts of Parliament made and passed concerning the said railway, and to the notice the plaintiff annexed a plan more particularly delineating the said dwelling-house. And the plaintiff saith, that the Company did not nor would, within thirty days after the service of the said notice, treat for the purchase of the estate, interest, and property of him, the plaintiff, as such lessee, in the dwelling-house mentioned in the said notice, nor for the compensation, recompense, or satisfaction to be made to him as such lessee, for any loss, damage, or injury in respect of any good-will, tenant's fixtures, improvements, or otherwise occasioned by the taking thereof, nor did the plaintiff and the Company within that time, nor afterwards agree as to the value of the estate, &c., nor as to the amount of the compensation, &c., as aforesaid. Whereupon the plaintiff afterwards and after the expiration of

(a) The material sections of the statutes are set out, *antè*, p. 397, n.

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the said thirty days, to wit, on &c., did, by a request in writing then made by him, request the Company to issue a warrant to submit the matter in dispute between him, the plaintiff, and the Company, of and concerning the premises, to the determination of a jury, in the manner and according to the regulations prescribed by the said acts. And the plaintiff further saith, that the Company did not nor would, within the space of twenty-one days after the making of the request, comply with the same, nor issue their warrant according to the regulations prescribed by the act for the impannelling and summoning of a jury as aforesaid, and thereupon he, the plaintiff, afterwards and after the expiration of the space of twenty-one days after the making of the request to the Company, as aforesaid, to wit, on &c., did himself send a request in writing to the sheriff of Middlesex, according to the tenor and provisions of the said acts, and did thereby request the sheriff to impanel, summon, and return a jury according to the provisions and in the manner prescribed by the said acts of Parliament, to inquire of and assess and give a verdict for the sum of money to be paid by the Company to the plaintiff for the purchase of his estate, &c., as such lessee, &c., and for the compensation, &c., and to proceed in that behalf, in the manner and according to the regulations prescribed in the first-mentioned act of Parliament, upon the issuing of the warrant of the Company as therein directed. And the plaintiff further says, that upon a certain inquisition taken in pursuance and accordance and compliance with the last-mentioned request, afterwards to wit, on &c., to wit, at the house known by the name of the Sheriff's Office, in Red Lion-square, in the county of Middlesex, before Thomas Farncombe and Michael Gibbs, Esqrs., then being sheriff of the said county of Middlesex, and W. H. J., &c., twelve honest, lawful, sufficient, and indifferent men of the said county, qualified according to the laws of this realm to serve in juries for trials of issues in her Majesty's

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courts of record at Westminster, being duly impannelled, summoned, returned, and drawn pursuant to the provision of the said acts, the said Thomas Farncombe and Michael Gibbs, at the time of the said request and then being sheriff of the county of Middlesex as aforesaid, and being by and before such sheriff, at the time and place last aforesaid, duly sworn to inquire of and concerning the matters in the said request on that behalf mentioned, and thereby referred to be inquired of, assessed, and ascertained by them in manner therein mentioned, and the plaintiff and the Company by their counsel respectively having at the time and place of inquisition aforesaid appeared before the said sheriff and the jurors, and having respectively adduced evidence before the sheriff and jurors touching the matters so in question as aforesaid; the said jurors upon their oath said, that the said dwelling-house before the time of such notice to purchase so given as aforesaid and then still was deteriorated in value by the construction of the railway, authorized by the first-mentioned act, and they the said jurors did there and then assess, and give a verdict for the sum of £250, to be paid by the Company to the plaintiff for the purchase by them of the plaintiff of his estate and interest in the said dwelling-house, and also by way of satisfaction, recompense, and compensation for all damages in respect of the tenant's fixtures of the plaintiff in the said dwelling-house, and in all other respects whatsoever under the provisions of the said acts, in that behalf. And the plaintiff further says, that the sheriff did then and there accordingly, pursuant to the said acts, give judgment for the sum of £250 so assessed by the jury, to be paid by the Company to the plaintiff, according to the provisions of the said acts, and the said verdict and judgment were then and there, to wit, at the time and place of holding the inquisition as aforesaid, duly signed by the sheriff: and the plaintiff says, that the verdict and judgment, having been so signed by the sheriff as aforesaid, were afterwards,

and before the commencement of this suit, to wit, on &c., by the sheriff duly deposited, left, and lodged with the clerk of the peace for the county of Middlesex, to be by him kept, and the same are now by him kept among the records of the quarter sessions of the county of Middlesex, and the said verdict and judgment still remain among the records of the said quarter sessions &c., in full force and effect, and in no wise satisfied, reversed, or annulled. And the plaintiff avers, that the parish of St. George above mentioned, is the same parish as is described in the first-mentioned act of Parliament, all of which premises the Company then and there, to wit, on the day and year last aforesaid, had notice. And the plaintiff in fact saith, that he being interested as aforesaid in the property to which the inquisition referred, and known to the said Company as the person so interested therein and entitled to receive the sum of £250, upon making such title and conveyance as hereinafter mentioned, and being there present, to wit, in the county of Middlesex aforesaid, and the said property not being property which any corporation, trustee, or person under disability was by the first-mentioned act incapacitated to convey, (of all which premises the Company there had notice), was afterwards and after the recording of the said verdict and judgment, and within a reasonable time in that behalf, and before the commencement of this suit, to wit, on the day and year last aforesaid, ready and willing and able to have made to the Company, and to the satisfaction of the Company, a good title to the property to which the said inquisition referred, and also to have made a proper conveyance thereof to the Company, upon payment by them of the sum of £250, and to have received that sum accordingly, whereof the Company then had notice, but discharged him from making, and waived the tender of any such title or conveyance, and gave him notice that they would not accept such title and conveyance, or either of them, if made. And the plaintiff in fact

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saith, that he hath not as yet obtained payment and satisfaction from the Company of the sum of £250, for which the jurors so gave their verdict, and the sheriff so gave judgment as aforesaid, or any part thereof; although the Company afterwards and before the commencement of this suit were requested by the plaintiff to pay him the said sum of money; whereby, &c.

Second count. And whereas also, after the said inquisition in the first count of the declaration mentioned, to wit, on &c., the costs, charges, and expenses of summoning the jury, and the expenses of witnesses on the inquisition were duly settled and determined by the sheriff, pursuant to the said acts, at a certain sum, to wit, the sum of £110, to be paid by the Company to the plaintiff, who, by reason of the premises in the first count mentioned, had been prevented from treating and agreeing as aforesaid; whereof the Company, (who, prior to such settlement and determination, had had due notice to attend before the sheriff on that occasion), afterwards, to wit, on &c., had notice; and the last-mentioned sum of money was then, and more than ten days before the commencement of this suit, duly demanded of the Company by the plaintiff, yet the plaintiff in fact saith that he hath not yet obtained payment or satisfaction of the last-mentioned sum of money; whereby, &c.

Pleas: 1. That the said Thomas Farncombe, Esq., in the declaration mentioned, at the time of the request so made by the plaintiff to the sheriff of Middlesex, to summon a jury for the purposes in the said declaration in that behalf mentioned, and thence continually until and at the respective times of holding the inquisition and giving the judgment in the first count mentioned, and of the settling and determining of the costs, charges, and expenses in the second count mentioned, was, and continued to be a shareholder in the said Company, and by means thereof the said inquisition and judgment, and the settling and determining

the said costs, &c., were and are wholly void and of no force and effect. Verification.

2. That upon the holding of the inquisition in the first count mentioned, to wit, &c., the plaintiff adduced evidence before the sheriff and jurors, not only of the loss and damage in respect of good will, tenant's fixtures, improvements, or otherwise alleged by the plaintiff to have been occasioned by the taking of the dwelling-house in the declaration mentioned, but also of certain loss and damage alleged by the plaintiff to have been sustained by him in respect of the said dwelling-house, by reason of the construction of the railway, and that the jurors did assess and give a verdict for the said sum of £250, to be paid by the Company to the plaintiff, for the purchase by them of the plaintiff of his said estate and interest in the dwelling-house, and also by way of satisfaction, recompense, and compensation, for the several losses and damages in this plea hereinbefore mentioned; by reason of which said premises the said inquisition, and the verdict and judgment in the declaration mentioned, became, and were, and are wholly void and of none effect. Verification.

Special demurrer to both pleas, and joinder.

Channell, Serjt. (*Butt* with him), in support of the demurrer (*a*).—As to the first plea, the objection that Mr. Farncombe was a shareholder in the Company, and, therefore, that the proceedings are void, is no answer to the action, for three reasons:—1. He is only part of the officer of sheriff of Middlesex, so that he does not come within the words of the 22nd section of the first act, and the *sheriff* cannot be said to be interested. *Thompson v. Farden* (*b*), shews that such a distinction may be made. 2. The objection does not arise in the case of proceedings

(*a*) November 11th, 1842, before *Tindal*, C. J., *Coltman*, *Erskine*, and *Maule*, Js.

(*b*) 1 Scott, N. R., 275; 8 Dowl. P.C., 813. See *Letsom v. Bickley*, 5 M. & S. 144.

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instituted by the claimant, who might not know of the disqualification; the provisions of that 22nd section apply only to inquisitions set on foot by the warrant of the Company; and in the 22nd section of the last act the interest of the sheriff is not mentioned. 3. But, even if this were an objection which, taken at the proper time, would vitiate the proceedings, it is not valid in this case, as the Company, by appearing and taking part in the proceedings before the sheriff, must be taken to have waived it. As to the second plea, the objection, that the jury, in their assessment of damages, have included not only the purchase-money, goodwill, &c., but also the damage to the house by the construction of the railway, has been held, *In re The London and Greenwich Railway Company (a)*, to be insufficient. It does not appear by the record that evidence was admitted on that point, nor that it influenced the verdict of the jury, who may have assessed the damages separately, though their verdict was for one sum. Besides, it is an essential ingredient in the value of the house, and the claimant is not to recover the deteriorated, but the original value.

Bompas, Serjt. (*H. Hill* with him), contra.—1. The act of the sheriff is the act of both the persons comprising that office, and, therefore, the interest of one vitiated the authority of both. The 22nd section of the last act must be construed with the same provision as the 22nd section of the first; and if there was absence of jurisdiction, there could be no waiver.

2. The 22nd section of the first act requires a separate and distinct inquiry and assessment of the compensation for damages, besides for the purchase of the property. The verdict, therefore, must also be separate, so as to appear so on the record. Besides, the jury have no right to

(a) 2 A. & E. 678; 4 N. & M. 458.

give damages and purchase-money for the same premises. [*Mauie*, J.—The question is, whether the value means before or after deterioration; if the house, originally worth £20,000, is so deteriorated as to be worth only £500, the Company are not to get it for £500.] They are only to pay for the damage occasioned by the actual taking of the house.

3. The provision as to costs does not apply to the case of proceedings instituted by the claimant. They are only authorized by the last act, which has no reference to costs.

Channell, Serjt., in reply, cited *Ferguson v. Mitchell* (a), *Boydell v. Jones* (b), and *The Parrett Navigation Company v. Stower* (c), to shew that if any count of the declaration is good, the plaintiff is entitled to judgment, the pleas being to the whole action.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the Court.—The plaintiff in this case declared in an action of debt, and after stating, in his declaration, the formation of the Railway Company by the statute 6 & 7 Will. 4, he stated that the plaintiff was lessee of certain premises for a certain term of years, which premises were situated within fifty feet of the railway; and, that, by reason of the construction of the railway, his premises had been greatly deteriorated in value; that, within the period of twelve months, he gave notice in writing that he was ready to treat for the sale of the same to the Company; that the Company would not, within thirty days after such notice, treat for the purchase of his interest, nor for the compensation or satisfaction to be made to him for his loss or damages in respect of his goodwill, tenant's fixtures, improvements, or otherwise, nor agree with him for the value

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of his interest; that, after the expiration of the thirty days, he requested the Company to issue a warrant, and to submit the matter in dispute to the determination of a jury; that the Company did not do so within twenty-one days; and that thereupon the plaintiff sent his request in writing to the sheriff of Middlesex, to summon a jury to inquire of and assess, and give a verdict for the sum of money to be paid for the purchase of his interest, and for the compensation to be paid him by the Company for his damage in that behalf. The declaration then avers that the inquisition was taken in pursuance thereof before Thomas Farncombe and Michael Gibbs, Esquires, then being *sheriff* of the county of Middlesex, in which county the premises in question were situate; that the jury were duly impannelled; that the plaintiff and defendants appeared before such jury by their counsel; that the jury found that the dwelling-house of the plaintiff, before and at the time of the notice to purchase, was deteriorated in value by the construction of the railway, and assessed and gave their verdict for the sum of £250, to be paid for the purchase by the Company of the plaintiff of his said interest, and also by way of satisfaction, recompense, and compensation for all damages in respect of the tenant's fixtures of the plaintiff in the said dwelling-house, or in all other respects whatsoever; that the said sheriff gave judgment for the said sum so assessed by the jury; that the verdict and judgment were duly signed, and were properly deposited as required by the said act; that the plaintiff was ready to convey and make a good title to the property; of which premises the defendants had notice, but that the plaintiff had not obtained payment of the said sum of £250, although the said Company had been requested to pay, by reason whereof an action had accrued to recover the said sum. The declaration contained a second count, for the costs and charges of the proceedings which the plaintiff had taken under the act.

The defendants pleaded, first, that Thomas Farncombe, Esq., at the time of the request so made to the sheriff of Middlesex, and from thence continually to the time of holding the inquisition and giving the judgment, and of settling and determining the costs, &c., was, and continued to be a shareholder in the said Company, by means whereof the inquisition and judgment, and the determining of such costs, charges, and expenses were wholly void. The defendants further pleaded, that, at the holding of the said inquisition, the plaintiff adduced evidence not only of the loss and damage in respect of the goodwill, tenant's fixtures, improvements, or otherwise, but also of loss and damage in respect of the dwelling-house, by reason of the construction of the railway, and that the jury assessed and gave their verdict for the said sum of £250 for the purchase of the plaintiff's interest in the dwelling-house, and also by way of satisfaction, recompense, and compensation for the several losses and damages in that plea mentioned, by reason whereof the inquisition and judgment were void. To each of these pleas the plaintiff demurred specially, and the defendants joined in demurrer.

With respect to the objection raised by the first of these two pleas, even admitting that the 22nd section of the prior act applies to the case where the office of sheriff is constituted and composed of two persons, as in the sheriffwick of Middlesex, and where one only of such persons is a shareholder, yet we think the present case does not fall within the provision therein contained; that section contemplates the case where the Company issue their warrant to summon a jury, and the sheriff is a shareholder in the Company, and in that case enacts, that the warrant of the Company shall not go to the sheriff, being one of their own shareholders, but to the coroner. It is very reasonable where the Company issue a warrant, as they must know beforehand from their own books if the sheriff is a share-

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holder or not, that they should not be allowed to send their warrant to one of their own body, and thereby in effect constitute one of the individuals of whom the Company is composed, and who may be presumed to be interested in their favour, to be a judge in their own behalf; but the present case falls within, and is governed by the 22nd section of the subsequent act, the 2 & 8 Vict. c. xcv, being a case in which the Company have declined or neglected to issue their warrant within twenty-one days after a request made by the party for that purpose, and in which the claimant is authorized to send his request in writing to the sheriff to summon a jury. The party has no means of knowing whether the sheriff is a shareholder or not, and accordingly in this clause there is no provision made in the case of the sheriff being a shareholder, as in the former act; we think, therefore, that the answer to be given to the objection raised by the statement in the first plea is, that this case does not fall within the provision of the former statute, and if so, that the impannelling of the jury and the other acts done by the sheriff of Middlesex cannot be considered as void; and supposing them to have been voidable if objected to at the proper time, we think that the Company have waived any objection, if such could have been made by them, by appearing before the sheriff and jury and allowing the inquisition to proceed and the judgment to be given thereon; for the objection itself, that the sheriff was a shareholder and therefore interested in the behalf of the Company, is an objection taken by the Company to a matter in their own favour, and it would be unreasonable that they should lie by and await the result of the proceedings, and raise no difficulty until after they had seen the inquisition, and had determined whether it was satisfactory to themselves or not; we therefore think, that the objection, if it could ever have prevailed, at all events comes too late, and that the first plea is bad in law.

The second plea raises the objection to the inquisition, that evidence was given before the jury, not only of the loss and damage in respect of goodwill, tenant's fixtures, and otherwise, by the taking of the plaintiff's dwelling-house, but also of the loss and damage sustained in respect of the dwelling-house by reason of the construction of the railway. And it was urged in argument, first, that the plaintiff had adduced such evidence before them; and secondly, that the sum assessed by the jury was composed of damages given in respect of both those grounds of injury. But we cannot see how the mere fact of the plaintiff's adducing such evidence before the jury, and the reception thereof by the sheriff, can of itself affect the validity of the verdict, because such evidence may have been given to shew that the house had been deteriorated, which was necessary to give jurisdiction to the sheriff and jury. And as to the objection that the sum assessed comprises damages given for injury to the premises by the construction of the railway, we think that we must take the inquisition as it is set out on the face of the declaration, which gives a verdict for the sum of £250, "for the purchase of the house by the Company, and also by way of satisfaction, recompense, and compensation for all damages in respect for the tenant's fixtures of the said plaintiff in the said dwelling-house, or in any other respects whatsoever," thereby excluding any damage for the deterioration of the house by the original construction of the railway. The objection is then raised, that, by the 22nd section of the former statute, it is expressly provided that the jury shall assess and give a verdict for the sum to be paid for the purchase of the lands, and also the sum of money to be paid by way of satisfaction, recompense, or compensation for goodwill, &c., and then proceeds, "which satisfaction, recompense, or compensation for such damage or loss shall be inquired into and assessed separately and distinctly from the value of the lands so to be taken or used as aforesaid;" and the

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question is, whether the words just adverted to are compulsory and in the nature of a condition, so that if they are not observed, the inquisition and subsequent judgment are to be held void, or whether they are directory only, so that the Company or the claimant might call on the sheriff to keep the evidence distinct as to the value of the premises, and the satisfaction for damage, and to find and adjudicate a separate sum in respect of each. We think the words directory only. There are no expressions in the statute which require them to be construed as words of condition, or which shew such intention on the part of the legislature; and they are not to be construed to avoid the proceedings, unless such appears the necessary construction. The Court of King's Bench, in *In re The London and Greenwich Railway Company* (a), which arose on a very similar clause of another statute, considered these words as directory only, and that the Company could not treat the verdict as a nullity, it being the duty of the Company to have called on the jury at the time to make a separate assessment of the value of the land and of the damage done. We therefore think that, notwithstanding the objections raised by both the pleas, the plaintiff is entitled to judgment on the first count.

As to the second count, which is brought for the costs, charges, and expenses which are alleged to have been duly settled and determined by the sheriff, pursuant to the acts, at a certain sum to be paid by the Company to the plaintiff, who, by reason of the premises in the first count mentioned, had been prevented from treating and agreeing for the sale of the property in question, we think that the act has not provided for the case now under consideration. The only clause which gives costs and charges is the 27th section of the earlier statute, but that appears to be limited in its operation to the case where the Company are

(a) 2 A. & E. 678; 4 N. & M. 458.

compelling the owner of property to sell or accept satisfaction for damages. That section provides for three cases:—where the jury shall give the same or a sum greater than that which the Company have previously offered—where the verdict of the jury is given for a less sum—and where, by reason of absence in foreign parts, or from any other cause or disability not therein provided for, any person shall be prevented from treating or agreeing as aforesaid. But the present case does not appear to fall within either of the classes above set forth: clearly not within either of the two first enumerated; nor within the last, which, by the instance specified, cannot be intended to comprehend the case of a simple non-agreement, on the ground that the Company will not treat, but some cause or disability independent of the mere agreement of the parties themselves. The 22nd section of the statute 2 & 3 Vict. c. cxv, which first enables the claimant to enforce the proceedings before a sheriff's jury against the Company, is altogether silent on the subject of costs, except by words of reference at the end of the section; which words, at most, apply only to the three cases enumerated in the 22nd section of the former act, amongst which the present case does not fall.

We therefore think the plaintiff is entitled to judgment on the first count, and the defendants to judgment in their favour on the last count of the declaration.

Judgment accordingly.

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In Hilary Term, 1843.

Jan. 17. THE CLARENCE RAILWAY COMPANY *v.* THE GREAT NORTH OF ENGLAND, CLARENCE, AND HARTLEPOOL JUNCTION RAILWAY COMPANY.

By a railway act, 1 Vict. c. xcv, a Company were empowered to make a railway over certain lands to a certain point. Section 4 provides, that nothing in the act shall authorize the Company to enter the lands of any person, without the previous consent of the owner. Section 43 enacts, that, in every case in which the said railway shall cross any other railway, the communication &c. between the two railways, in case of disagreement, shall be made in such manner as shall be directed by two engineers (one to be chosen by each party) and an umpire, whose decision shall be binding on all parties; Provided that the engineer of the Company, if the owner of the railway to be crossed shall, for twenty-one days after notice, neglect to appoint an engineer on his behalf, shall have power to make such communications &c. as he shall think proper; that the said Company shall make satisfaction for damage &c. occasioned by such crossing, and shall have full power at all times to cross such railway by means of such communication.

Held, that the 43rd section did not *clearly* impose a limitation on the general words of the 4th section; and, therefore, that the consent in writing of the owner of a railway, intended to be crossed by another railway, was still necessary under the latter section.

BY an order of the Court of Chancery made herein, (*antè*, Vol. 2, p. 763), a case was sent for the opinion of this Court, stated in the form of an action of trespass.

The declaration stated, that the defendants broke and entered a close of the plaintiffs situate in the township of Thrislington, in the county of Durham, being that part of the Sherburn Branch Railway, and of the strips of land on each side of the same, which is next adjoining to the point where the works of a certain railway of the defendants, now commenced but not finished, approach nearest to the said branch railway of the plaintiffs, in the said township, and broke the fences, &c., thereof, and made and continued the said railway of the defendants across that of the plaintiffs.

Plea, that the defendants were incorporated by the 1 Vict. c. xcv (*a*), for making and maintaining a railway to

(*a*) The sections of the act, (1 are as follows:—
Vict. c. xcv), material to the case, Sect. 3 empowers the Com-

connect the Great North of England, Clarence, and Hartlepool Railways, in the county of Durham. It then set out

pany to construct and maintain the railway with all proper works and conveniencies connected therewith in the line or course, and upon, across, under, or over the lands delineated on the plan, and described in the book of reference, &c.

Sect. 4 enacts, "that nothing in this act contained, shall authorize or empower the said Company to enter into, or upon, or to take, use, damage, or prejudice the lands, estate, property, or effects of any corporation or person whomsoever, without the consent in writing of the owner and occupier thereof, or other party by this act or otherwise entitled to give such consent, first had and obtained."

Sect. 14. "That nothing in this act contained shall extend to prejudice, diminish, alter, or take away any of the rights, privileges, powers, or authorities vested in the Clarence Railway Company, but securing and reserving to the said Clarence Railway Company all such rights, privileges, powers, and authorities in the same manner, to all intents and purposes, as if this act had not been passed."

Sect. 16 empowers the Company to contract, &c. generally for the purchase of lands for the purposes of the railway.

Sect. 17 empowers them to contract for waggon-ways and rights of way.

Sect. 18 provides for settlement by the arbitration of surveyors, in case where parties willing to grant such waggon-ways, &c. to the Company cannot agree as to the terms,

which arbitration is to be binding and conclusive on all parties.

Sect. 43 enacts, "that in every case in which the said railway by this act authorized to be constructed, shall cross any other railway, whether public or private, the communication between the railway by this act authorized to be constructed, and such other railway, and all openings in the ledges or flanches of the rails of such other railway, (if the same shall be crossed upon a level), or if the same be not crossed upon a level, then all bridges over, or tunnels under the railway so to be crossed for the purpose of such crossing, shall if the said Company, and the parties to whom such other railway belong, do not agree about the same, be made in such manner as shall be directed by two engineers, or other competent persons, one to be appointed by the said Company, and the other by the parties to whom the railway to be crossed shall belong, and such engineers, or other persons shall, and they are hereby required, before entering upon the matter referred to them, to appoint a third engineer or other person, to be an umpire, to whom, in case there shall be any difference of opinion between the said engineers or other persons so appointed, the matter in dispute shall be referred, and the decision of such engineers or other persons, or of such umpire, (as the case may be), shall be binding upon all parties: Provided always, that in case the parties to whom any railway so to be crossed

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the 3rd and 43rd sections of that act, and stated, that the defendants had made part of the railway over lands specified in the 3rd section, and that having occasion to cross the branch railway of the plaintiffs on the level, at &c., for the purpose of continuing the same in the line mentioned in the act, towards one of the authorized places of junction, they gave notice to the plaintiffs of their intention, requiring them, within ten days, to appoint an engineer to agree with the engineer of the defendants, as to the mode of communication, and offering to pay expenses; which notice not being complied with, defendants did &c. (justifying the trespasses in the declaration). That defendants paid all expenses, and were ready to make satisfaction for damage.

The replication alleged the completion of plaintiffs' railway under the several acts authorizing them, and that the plaintiffs were seised in their demesne as of fee of and in the said close. It then set out the 4th and 14th sections of the 1 Vict. c. xcv, and stated, that the defendants had

shall belong, shall refuse, or for the space of twenty-one days next after notice signed by the clerk for the time being of the said Company requiring him so to do, shall neglect to appoint such engineer, or other person on his behalf, the engineer for the time being of the said Company shall have full power to make such communications with, and such openings in the ledges or flanches of the rails of, or such ledges over, or arches under the railway so to be crossed, (as the case may require), as he shall think proper; Provided also, that the said Company shall defray all the expense attending such reference, and the making of such communications and openings, bridges and tunnels, and keeping the same respectively

in repair from time to time, and shall also make satisfaction for any temporary, or permanent, or recurring injury which may be thereby occasioned to such railway so to be crossed, the amount of such satisfaction to be ascertained (in case of dispute about the same) in the same manner as disputes as to damages to a small amount are by this act directed to be ascertained, and to be recovered in the same manner as penalties and forfeitures are by this act directed to be recovered, and the said Company shall have full power at all times to cross every such railway by means of such communications with any engines and carriages without being liable to the payment of any toll or rate for so crossing."

not purchased the close, or contracted for a right of way under that act, and without the consent and against the will of plaintiffs committed the trespass. Verification. General demurrer and joinder.

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The point stated for argument by the defendants was, that the defendants had a right to cross the Clarence Railway at the locus in quo in the parliamentary line of their own railway, under the powers given by the clauses of the act set forth in the plea, without the previous consent of the Clarence Railway Company, after taking the preliminary steps set forth in the plea.

The case was argued in Michaelmas term, 1842 (a), by *Tomlinson* for the defendants, who contended that the compulsory powers given by the 43rd section were an exception to the general provisions of the 4th section, and entitled the defendants to cross the plaintiffs' railway without their consent. He cited, as to the construction of statutes, 19 Vin. Abr. 518; Statutes (E. 6.) 71; 2 Dwarries on Statutes, 658; *Stradling v. Morgan* (b), and *Churchill v. Crease* (c).

Sir *W. Follett*, Solicitor-General, contra, contended that the 4th section was not inconsistent with the 43rd, which only provided for settling the mode of crossing the line, but that consent was still necessary in that and all other cases. He cited *Webb v. The Manchester and Leeds Railway Company* (d), and *Priestley v. Foulds* (e).

Cur. adv. vult.

LORD DENMAN, C. J., now delivered the judgment of the Court.

(a) November 11th, before Lord Denman, C. J., *Williams, Coleridge*, and *Wightman*, Js.

(b) Flowd. 199.

(c) 5 Bing. 177.

(d) Antè, Vol. 1, p. 576; 4 M. & C. 116.

(e) Antè, Vol. 2, p. 422; 2 M. & G. 175.

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The question argued upon demurrer to the replication in this case, and the only question, was, whether, under stat. 1 Vict. c. xcv, which incorporates the defendants, they are empowered to cross the railway of the plaintiffs without their consent in writing. The 3rd section makes it lawful for the defendants to form their railway in a certain line, through and over lands described generally in that section; and the 4th section provides, that nothing in the act shall authorize them to enter into and upon, or to take, use, damage, or prejudice the lands, estate, property, or effects of any corporation or person whomsoever, without the consent in writing of the owner and occupier. Reading the two sections together, as they must be read, the powers given by the first are conditional only, and the condition is the procuring the written consent of every owner and occupier of lands necessary to be entered on, taken, used, damaged, or prejudiced, in order to the making of the railway according to the statutory line; any such owner or occupier, whether corporation or person, whose lands are indispensable, has it in his power to stop the whole proceeding.

But the defendants dispute the universality of this proposition, they say that it does not extend to any corporation, owner, or occupier of lands covered with a railway; and that in such case they may enter, take, use, damage, or prejudice without consent. This limitation, which involves interference, it may be of the most important kind, with property very valuable, they are bound to make out in clear and unambiguous terms, and they allege they find it so laid down by the 43rd section. That contains provisions regulating the communications with other railways, as to the mode of making such communications, and the openings in the ledges or flanches of the railway to be crossed, if crossed on a level, or, if not, the bridges over or tunnels under it, whenever the two railways cannot agree about the mode. Nothing is said of consent in this case; whence the defendants infer that consent is not necessary; and they

further urge, that, to provide compulsorily for the particular mode of carrying into effect the crossing, in case the parties cannot agree as to that, is inconsistent with the notion that the plaintiffs might stop the whole proceeding, merely by refusing to consent to the crossing by any mode or upon any terms. And if these remarks were addressed only to the correct framing and wording of the statute, they would be very material; but the question for us is whether this section *clearly* imposes a limitation on the general words of the 4th section, and we are of opinion that they do not. The 4th and 43rd sections, on the contrary, may well be reconciled, by holding that the latter takes up the subject after the consent has been obtained generally under the former to a crossing being made, and is confined only to the details as to the mode in which it is to be made. This is all that in terms it professes to do in this part, and there is nothing unreasonable in supposing, on the one hand, that the defendants would have secured beforehand this general consent, which they must have known to be indispensable to their whole proceeding, or, on the other, that the settlement of details may have been postponed by mutual agreement until the undertaking was further advanced, and so necessarily to be provided for by the act. And it is to be observed, that there is an omission in the 43rd section, quite unaccountable upon the defendants' theory; for although it goes on to provide at whose expense the crossing shall be made and repaired, and for the settlement and payment of satisfaction for temporary, permanent, or recurring injury, and then gives the defendants full power at all times to cross with any engines or carriages without payment of toll, it omits to make any regulations for the hours of crossing, or to enter into, or provide for any of those details which must be necessary, in order to do justice between the parties, or insure safety to the public.

The counsel for the defendants urged that it was unrea-

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sonable to suppose that the legislature had left it in the power of a rival railway to prevent entirely the formation of the line; the answer to this is, that the legislature has certainly left the same power in every other corporation or person, whose consent is made necessary by the 4th section, and that there is nothing unreasonable in supposing that the legislature would not authorize the undertaking at all, unless by consent of all parties interested in the line, and might therefore presume that all necessary consents had been obtained. But, however this may be, it is more unreasonable to suppose, because it involves actual injustice, that the legislature should have placed a railway in which individuals had already embarked their capital, and in which the public had already acquired rights, so entirely at the mercy of a new Company as the defendants' argument on the 43rd section supposes; whereas, if the consent of the plaintiffs be necessary to any crossing, they will have an opportunity of imposing such terms as to the times of crossing, the warnings to be given, and other matters, as may prevent any interference with the safety of their own trains, and protect their own interests.

We make these remarks in order to shew that the defendants' construction of the 43rd section is neither certain nor probable, consequently it does not relieve them from the pressure of the 4th section, to which they were bound to give a clear answer. Our judgment, therefore, will be for the plaintiffs.

Judgment for the plaintiffs.

A certificate to the effect of the foregoing judgment having been returned to the Court of Chancery, an injunction was thereupon granted to the effect prayed by the plaintiffs' bill, *antè*, Vol. 2, p. 765.

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IN *Michaelmas* Term, 1842, *Kinglake* obtained a rule nisi for a mandamus to the Bristol and Exeter Railway Company, commanding them to excavate and restore part of a turnpike-road on both sides of a certain bridge or viaduct made by the said Company across the Taunton and Kingston road, in the parish of Taunton St. James, &c., to its former breadth, previous to the excavations and alterations made in the road by the Company; and to restore and make convenient the footpath on the side of the road, according to the provisions of the act (6 & 7 Will. 4, c. xxxvi) incorporating the Company (a), and to

Where certain works, authorized by a railway act (6 & 7 Will. 4, c. xxxvi), to be done in a particular manner, and in a specified time, have been completed by the Company, in a manner which is objected to; in order to obtain a mandamus to enforce the performance in the way required by the act, it should distinctly appear that a specific complaint has been made to the Company, since the completion of the work; and a distinct demand of what the party moving desires to enforce, and a refusal, in effect, by the Company.

Expressions of disapprobation while the works are proceeding, though proper to be made, do not relieve such party from the necessity of specifically demanding a proper compliance have waived his

(a) The material sections of the act are as follows:—

Sect. 8 empowers the Company to enter into and upon lands, &c., and for the purposes, and according to the provisions and restrictions of this act, to carry the railway over or under roads, &c.

Sect. 80, for regulating the construction of the bridges over the river Tone, enacts, "that the said Railway Company shall, and they are hereby required to build, at their own expense, in a proper manner, and for ever afterwards maintain in perfect repair, two good, firm, and substantial bridges, or viaducts, of brick, stone, or iron, over the said river, in the several situations where the said railway is intended to be carried over the said river," &c.

Sect. 114 enacts, "That when any bridge shall be erected by the said Company, for the purpose of carrying the said railway over or across any public carriage-road, the span of the arch of such bridge shall be formed, and shall at all times be and be continued of such width as to leave a clear and open space under every such arch of not less than fifteen feet; and of a height, from the surface of such road to the centre of such arch, of not less than sixteen feet," &c.

Sect. 115. "That where any bridge shall be erected for carrying any turnpike-road, &c., over the said railway, the road over such bridge shall be formed, and shall at all times be continued of such width as to leave a clear and open space between the fences of such

with the statute after the works are done, as without it he might be supposed to object.

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restore and make a certain part of the turnpike-road opposite a house occupied by &c., in the said road, in the said parish of &c., to its full former width, and to restore a footpath on the western side of the said road, and to restore and make the turnpike-road, called the Taunton and Cheddon road, and the footpath on the side thereof, in, &c. to their full former breadth, as the same respectively were previous &c.: and to increase the height of the said bridge or viaduct to the full height of sixteen feet from the surface of the road to the centre of the floor of the viaduct; and to construct and make an arched bridge instead of the present viaduct, and such as may be convenient for passengers and carriages, and to make a proper and convenient footpath under the same; and to make and erect a good and sufficient fence on each side of a bridge, and of the approaches to the same, erected by the said Company upon the Milverton and Minehead road, in the parish of &c.; and also to build and make a good and substantial bridge over the river Tone, on the London and Bridgewater road, at Bathpool, in the parish of West Monckton, in the said county, and to make a good and

road of not less than fifteen feet.
 And a good and sufficient fence shall be made on each side of every such bridge," &c.

Sect. 118 provides, "That in all cases wherein the exercise of any of the powers hereby granted, any part of any carriage or horse-road, railway, or tram-road, either public or private, shall be found necessary to be cut through, raised, sunk, taken, or so much injured as to be impassable or inconvenient for passengers or carriages, or to the persons entitled to the use thereof, the said Company shall, at their own expense, before any such road shall be so cut through, raised, sunk,

taken, or injured as aforesaid, cause another good and sufficient road, as the case may require, to be set out and made instead thereof, and such new road shall be as convenient for passengers and carriages as the said road so to be cut through, raised, sunk, taken, or injured as aforesaid, or as nearly so as may be, and where the road cut through, raised, sunk, taken, or injured shall be a turnpike-road, the substituted road, if temporary, shall be set out and made, and the principal road shall be restored within six calendar months after the commencement of the operation."

sufficient fence on each side of the said bridge, and of the approaches to the same which have been made by taking and raising the said road; according to the provisions of the said act.

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He moved upon affidavits made by and on behalf of the trustees of the Taunton turnpike-roads, which, after setting out the sections of the act empowering the taking of lands, the substituting roads, and erecting bridges over the railway, complained that the Company had made a viaduct over the turnpike-road from Taunton to Kingston, which was not constructed so as to form an arch under which the road might pass, but by erecting brick piers on each side of the road, and by throwing a horizontal floor of wood across the said piers, so as to make a flat way for the passage of the railway engines over the said floor, and a horizontal surface on the under side of the same. That open spaces were left between the planks of the floor, through which water, &c., dropped in bad weather on the passengers beneath. That the passage under the viaduct was not in the centre of the turnpike-road, but ran obliquely to the line of it; that the piers of the viaduct were not parallel with the sides of the road, and that the height from the surface of the road to the under side of the floor above was only $15\frac{1}{2}$ feet. That the turnpike-road had been narrowed, and the footpath rendered dangerous; and that the lowered road north and south of the viaduct had not been made of its previous width, especially at a part opposite a house occupied by Richard Autton, and where the Cheddon road joins the Kingston road.

That the trustees highly disapproved of and objected to these alterations, and that their surveyor, while the works were in progress, expressed to the Company his disapproval of the same, and that the trustees had frequently called on the Company to comply strictly with the provisions of their act. That more than six months had elapsed since

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the Company commenced to sink and alter the said several roads; and that the several roads so lowered and sunk by the Company are not as convenient for passengers and carriages, &c., as the same were before the said excavations and alterations.

The affidavits of the Company in answer stated, that the road over the viaduct was completed in July, 1842, and set out a correspondence between the clerk to the trustees and the engineer of the Company, in which the former, on the 4th of October, 1842, complained of the manner in which the work had been performed, as stated in the above affidavits, and continued thus:—"The trustees require that the roads so lowered or altered by the Company should be formed so as to leave the bed of the same of its original width, and that the footpath should be restored. They also complain, that the Company have not made a footpath under the arch of the said bridge, or by means of a tunnel by the side of the bridge, and the trustees hope the latter plan will be adopted for the sake of greater safety to passengers. The object of the above statement is to request you to inform the trustees, without delay, whether you propose making any, and what alterations in the present works, so as to obviate the above complaints." In answer to this, the engineer, in a letter of the 5th October, 1842, excused some, and explained others of the inconveniences complained of, and concluded as follows:—"I was particularly anxious to have impressed upon the trustees that their wishes could be generally much more easily met by my receiving them in any shape but that of a positive demand, containing possibly all the requirements that the several individuals of a numerous body can suggest, without much regard to the cost that may fall upon us, and which demands, with every desire to oblige, we might be driven wholly to resist, as in such shape we could not admit our liability."

That no answer to this letter was received by the engi-

neer, and that neither he, nor the resident engineer who superintended the works, was aware of any disapprobation expressed on the part of the trustees to the works.

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Sir *W. Follett*, Solicitor-General, and *Talbot*, now shewed cause (a), and took a preliminary objection, that it did not appear by the affidavits that there had been a specific demand and refusal to perform the works required by the mandamus.

Kelly and *Kinglake*, contra.—The necessity of a demand must be considered with regard to the thing required to be done. When there is no default until after a refusal, there must be a demand and refusal; but where an act, as in this case, requires something to be done in a definite time, a demand is not necessary, as the act itself supplies the place of one. [*Patteson*, J.—The Company may contend that they have complied with the act according to their construction of it, they may be right or wrong; but have you called upon them since the works were finished?] The proper time to call upon them is while the works are doing, and then if they, in defiance of such notice, proceed, that is such a refusal as would warrant an application for a mandamus. It may be quite right that there should be a specific demand in the case of an application for a mandamus for the delivery of a deed, or inspection of documents, as in *Rex v. The Wilts and Berks Canal Company* (b), or to present to a living, or the mastership of a school. But if an election to an office were about to take place, and one party applied to be appointed, but another were appointed, a mandamus would lie, though the demand were before the act complained of. If, by charter, the mayor of a town is to be elected on a particular day, the

(a) Before Lord Denman, C. J., *Patteson*, and *Coleridge*, Js.

(b) 3 A. & E. 477.

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omission to do so is in itself ground for a mandamus, and the writ in such a case does not recite a demand. In *Rex v. The Brecknock and Abergavenny Canal Company (a)*, Lord Denman, C. J., says, "There should be enough to shew that the party withholds compliance, and distinctly determines not to do what is required." In this case the Company have withheld compliance, and are now called upon within the six months allowed by the act for completing the restoration of the roads interfered with under the act.

Lord DENMAN, C. J.—I am of opinion that this objection ought to prevail. I think the clear meaning of the rule as to demand and refusal in cases of this nature is, that the applicant should have made a distinct demand, specifying the thing which he wishes the other party to do. It does not seem to me material to inquire what complaints were made by the trustees while the works were proceeding; if they did not object after their completion, they might, by acquiescence, be understood to have waived their right. If, after the works were completed, they think proper to complain of what has been done, they should give notice to the Company, distinctly pointing out what they complain of, and require to be done. The rule was established before the case of *Rex v. The Brecknock and Abergavenny Canal Company (a)*. I think that my words in that case import quite the contrary of what they have been cited as implying, they mean that the actual word "refuse," or a synonym to it, need not be employed, but that something equivalent to a direct refusal of a direct application must appear. In the report of that case, in Neville and Manning, is this sentence: "We cannot, therefore, issue this mandamus without violating the rule by which we frequently save a long inquiry." That refers to the neces-

(a) 3 A. & E. 222; 4 N. & M. 178.

sity of a distinct demand and refusal, and also to the rule, that, to prevent waste of time, such an objection should be taken in the first instance (a).

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PATTESON, J.—It was contended here that no demand was necessary, inasmuch as it was clear that what the act of Parliament requires had not been done. But I am afraid to go the length of the doctrine, that no demand at all is necessary in such a case. It would amount to this, that when a Company have completed their works in a mode at all varying from the letter of their act, a party disapproving of such deviation might come to this Court for a mandamus against the Company without giving them the least notice of their objection, or request to have the works done in another way. The only consideration that weighed with me was, whether what took place during the progress of the works in this case, when an objection was made, and no answer given to it, can be looked upon as equivalent to a demand and refusal, so as to support this application. But I think, that merely stating disapprobation of the mode in which the works were going on cannot be considered as sufficient to supersede the necessity of demanding of the Company the precise thing which the complainant wished them to do under his construction of the act.

COLERIDGE, J.—I am of the same opinion. With respect to the case of a mandamus to a corporation when the charter-day for the election of an officer is gone by, that forms an exception under the particular circumstances, for the obvious reason that a demand would be useless, as, the day of election having gone by, the corporation would have no power to do the thing required, except under the authority of a mandamus. It is of great importance in these cases, where there is frequently much difference of opinion as to

(a) See *Regina v. The Eastern Counties Railway Company*, 10 A. & E. 545, n. (b).

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the true meaning of the requisitions of particular statutes, that the party acting under a statute should not have a mandamus moved for against him before he has had distinctly brought to his notice the precise act which he is required to do, and his attention drawn to his adversary's construction of the statute. Here we have a case of many complicated works done by a Company, of which the trustees disapprove, and express their disapprobation during their progress. Their expressing their disapprobation at that time was proper enough as far as it went: had they not done so, their omission might have been used as an argument against them, if, upon a demand and refusal after the completion of the works, they had come here for a mandamus. But such an expression of disapprobation at the time does not at all relieve them from the necessity of making a distinct demand on the completion of the works to have that done, which, according to their interpretation of the act, they required. If, after that, the Company had refused—in effect, though not directly, that, according to the cases cited, would have been sufficient (a).

Rule discharged, without costs.

(a) *Wightman, J.*, was absent.

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COURT OF COMMON PLEAS.

In Hilary Term, 1848.

THE THAMES HAVEN DOCK AND RAILWAY COMPANY *January 30.*
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BOMPAS, Serjt., had obtained a rule nisi in this Term, calling upon the plaintiffs, Sir G. Stephen, and seven others named in the rule, who had acted as directors of the Company, to shew cause why all the proceedings in this action should not be set aside, and why the said Sir G. S., or the said seven persons, should not pay the costs of the action and of this application.

The action was in debt for calls under the 6 & 7 Will. 4, c. cviii. (a). The defendant pleaded, 1st, never indebted; 2nd, that he was not a proprietor.

In an action for calls, the defendant applied to set aside the proceedings on the ground that the action had been brought without authority, as the Company had ceased to exist. *Held*,—that as the cause had been set down for trial, and the defendant had known the

facts for a long time, the application was, at all events, too late.

And, that as the persons authorizing the action had for some time acted as directors, the validity of their appointment could not be questioned on such an application.

Held, also, that, after plea, it was to be presumed that the attorney had been appointed under the seal of the Company; and the Court refused to allow a plea raising that question to be added at that stage of the proceedings.

(a) See *The Thames Haven Dock and Railway Co. v. Rose*, *ante*, p. 178, where sections 108, 109, 110, 111, 112, 116, 118, 119, and 123 are set out. Besides those, the following are material to this case :

Sect. 94 enacts, "That the first general meeting of the Company shall be held within six months after the passing of the act, and that after such first general meeting there shall be a half-yearly general meeting of the Company in February and in August, in each and every year."

Sect. 95 enacts, "That a special general meeting of the proprietors of the Company may be called at any time by the directors for the time being, or any five of them, if they shall see occasion, and any twenty or more proprietors of the said Company holding in the aggregate 500 shares or upwards in the said undertaking, upon which all calls previously made shall have been actually paid and satisfied, may, at any time, by writing under their hands left at the office of the

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The affidavits stated, that the Company were incorporated by the act 6 & 7 Will. 4, c. cviii, and after referring

said Company, require the directors of the said Company to call a special general meeting of the proprietors of the said Company to be held in London, so as such requisition fully express the object for which such special general meeting is required to be called, and the said directors are thereupon required to call such meeting accordingly; and in case of neglect or refusal of the said directors to call such meeting for the space of fourteen days next after such requisition given or left as aforesaid, the same may be called by such twenty or more proprietors, by giving fourteen days' notice thereof, by advertisement in two or more London newspapers, and in one or more newspaper or newspapers usually circulating within the county of Essex, such notice expressing the object for which such special general meeting is required to be called; and the said Company are hereby authorized to meet in pursuance of such notice, and such of the proprietors as shall be present at such meeting shall proceed to the execution of the powers by this act given to the said Company with respect to the matters so specified in such notice; and all acts and resolutions of the major part in votes of the proprietors of the said Company met together at any such special general meeting shall be as valid and binding, with respect to the matters specified in such notice, as if the same had been done or resolved at a general meeting held at the time hereinbefore appointed for holding the same."

Sect. 98 enacts, "That if, at any such general meeting, there shall not be twenty proprietors present who shall be holders of at least 500 shares in the aggregate within two hours from the time appointed for such meeting, no choice of directors shall be made nor shall any business be done, but in such case there shall be another meeting of the said Company, at the same place and at the same hour, at the expiration of seven days then next; and if, at such adjourned meeting, such sufficient number of proprietors shall not attend within the time last aforesaid, the directors for the time being shall continue to act and have the same powers as they had and were possessed of until the next general half-yearly meeting, or until new directors shall be appointed."

Sect. 124 enacts, "That in any action to be brought by the said Company against any proprietor of any share in the said undertaking to recover any money due and payable to the said Company for or by reason of any call made by virtue of this act, it shall be sufficient for the said Company to declare and allege that the defendant, being a proprietor of so many shares in the said undertaking, is indebted to the said Company in such sum of money as the calls in arrear shall amount to, for so many calls of such sums of money upon so many shares belonging to the said defendant, whereby an action hath accrued to the said Company by virtue of this act, without setting

to sections 94, 108, and 109, stated, that within six months after the passing of the act, viz., on the 28th of September, 1886, the first general meeting of the Company was held,

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forth the special matters; and on the trial of such action it shall only be necessary to prove that the defendant, at the time of making such respective calls, was a proprietor of such shares in the undertaking as such action is brought in respect of, and that such calls were in fact made, and that notice thereof was given as is directed by this act, without proving the appointment of the directors who made such call, or any other matter whatsoever; and the said Company shall thereupon be entitled to recover what shall appear due, including interest computed as aforesaid, in respect of such calls, unless it shall appear that any such call exceeded 5*l*. for every share of 50*l*., or was made within the space of three calendar months from the last preceding call, or that calls amounting to more than 20*l*. in the whole had been made in some one year; and in order to prove such defendant was a proprietor of such shares in the said undertaking as alleged, the production of the book in which the secretary of the said Company is by this act directed to enter and keep a list of the names and additions and places of abode of the several proprietors of shares in the said undertaking, with the number of shares they are respectively entitled to hold, shall be *prima facie* evidence that such defendant is a proprietor, and of the number or amount of his shares therein."

Sect. 246 enacts, "That no director of the said Company to be

appointed under the authority of this act shall, by reason, or means, or on account of his being party to, or making, signing, or executing in his capacity of director of the Company, pursuant to the act, any contract or other instrument for or on behalf of the said Company, or otherwise lawfully executing any of the powers and authorities given to the said directors by this act, be subject or liable to be prosecuted or impleaded, either individually or collectively, by any person whomsoever, in any court of law or equity or elsewhere; and that the bodies, goods, chattels, lands, or tenements of the said directors, or any of them, shall not, by reason, on account, or in consequence of any such contract or other instrument so entered into, or made, signed, or executed by them, or any of them as aforesaid, or any other lawful act which shall be done by them or any of them in the execution of any of the powers and authorities given to them or any of them by this act, be liable to be arrested, seized, detained, or taken in execution; but that, in every such case, any person making any claim or demand upon the said Company, or upon any directors thereof, under or by virtue of any contract or instrument or other lawful act, may sue and implead the said Company, in like manner as if such contract, instrument, or other act had been entered into, and executed, and done under the common seal of the said Company."

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when the first directors went out of office, and twelve persons were elected in their stead. That on the 21st of February, 1837, the first half-yearly meeting of the Company was held, when the directors reported that in the state of the finances of the Company they should not have been justified in commencing the intended works. That on the 28th of August, 1837, the second half-yearly meeting was held, when the directors reported that they had been prevented commencing the intended works, and that they also felt that the shares were in too few hands to enable them to anticipate success to the undertaking; and it was then unanimously resolved, that the affairs of the Company should be wound up, and the Company dissolved as to all such parties as were desirous to retire; and the directors then stated, that they should feel it their duty to carry such resolution into effect in such a way as should withdraw all responsibility as to the future from those who might be disposed to retire. That the defendant testified his wish to retire, and, at the secretary's request, forwarded to him his certificates of shares, with a consent to relinquish the same. That the chairman of the Company, and other directors, did also thereupon withdraw from the Company, together with the solicitors of the Company, and a numerous body of proprietors; that, in the belief of the defendant, from the period of such retirement no legal body of directors, duly qualified and elected pursuant to the provisions of the act, had since been constituted, and that no legal or competent authority had since been substituted in any person or persons for exercising or assuming the powers or authorities conferred by the act for managing, directing, superintending, and controlling the business and concerns of the Company, and that the present action had been brought, and the style of the Company adopted and used for that purpose, without any sufficient authority, and in direct violation of the true intent and meaning of the act, and particularly of the 108th and 109th sections.

The defendant admitted, that after the partial dissolution of the Company, which took place in 1837, by the withdrawal of the chairman, &c., as before mentioned, the secretary of the Company, together with certain individuals interested as landowners and otherwise in respect of the land for the proposed docks and railway, did attempt to prevent the total dissolution of the Company, and with that view the following proceedings took place :—On the 18th of March, 1837, a meeting was held, purporting to be a half-yearly meeting of the Company, but which did not consist of twenty proprietors then present holding five hundred shares in the aggregate; that at such meeting no election of directors took place in conformity with the express provision of the 109th section, but instead thereof, a resolution was passed, that the vacancies in the direction be left to be filled at the discretion of the directors themselves. That other meetings, purporting to be half-yearly meetings, but none of which consisted of twenty proprietors, were held on the 29th of August, 1838, and the 27th of February and the 29th of August, 1839; that no half-yearly meeting was either advertised or held in February, 1840. That on the 29th of August, 1840, another half-yearly meeting was held, which separated without anything being done; that the secretary caused an advertisement to be inserted in the Post Magazine, on the 28th of November, 1840, in which he represented that the directors of the Company consisted of five persons resident in London, and seven persons resident in Manchester, (the five being J. Esdaile, and four of the other parties against whom the rule was moved). That in the belief of the defendant, no such appointment of the other seven had since been made, either in the form required by the act, or in any other form; that the five London residents before mentioned, had, up to that time, continued to act as directors, and that the only addition that had been made to their number was, that two persons, (being two more of the parties against whom the rule was moved),

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had, for about two years past, been associated with them. That, on the 25th of February, 1840, another half-yearly meeting was held, which was adjourned to the 4th of March following, when it was again adjourned, it having been found impracticable to procure on either of those occasions the attendance of the proprietors, except that of the official parties, or those who assumed to be such; that the secretary afterwards issued a prospectus of the Company dated May, 1841, in which the names of the directors (J. Esdaile, and the six others) were set forth. That another half-yearly meeting was held in August, 1841, when no business was transacted; that on the 23rd of February, 1842, another half-yearly meeting was held, when the chairman, J. Esdaile, stated that, although the legal number of proprietors were not present, he thought it desirable to proceed to business, and accordingly, in defiance of sect. 98, the meeting passed various resolutions, and the secretary read a report, in which it was stated that J. Esdaile and two of the other parties would go out of the direction by rotation, but, being re-eligible, would offer themselves for re-election, and they were accordingly re-elected, and had continued to that time to act as three of the seven persons constituting the direction; that a half-yearly meeting was advertised for the 31st of August, 1842, but no such meeting was held, the office being closed; that the report read at the meeting of the 23rd of February, 1842, contained a statement of the receipts and expenditure of the Company, from which it appeared, that the receipts from September, 1835, to December, 1841, amounted to 26,213*l.* 2*s.* 6*d.*; that, with the exception of a small balance in hand, the Company had expended the whole amount received, and, for the greater part, in a useless manner, such as salaries, &c. That the further liabilities of the Company were stated to amount to £8000 for outstanding bills, &c. That the proposed works for which the act was passed had

never been commenced, the Company being altogether destitute of the necessary means, and their powers for compulsory purchases of land having long since expired.

That Sir G. Stephen was the attorney for the plaintiffs in bringing this and other similar actions. That on the 18th of May last, and while this and other similar actions were pending, the said Sir G. S., as attorney for the secretary, convened a meeting of the creditors of the secretary. That the defendant had been informed that the said Sir G. S. proposed that the creditors should give him a twelve month's time for the payment of his debts, and represented to such creditors that if they would accede to such proposal, he would be enabled to satisfy his debts out of the proceeds of the actions brought at the suit of the Company for recovery of calls. That the present was the third action brought against the defendant at the suit of the plaintiffs for calls. That in the first, which was brought in 1839, the plaintiffs withdrew the record; that in the second they were again defeated; and that, although the defendant might obtain a verdict in the present action, he had no remedy for recovery of his costs, the Company being without any property that could be taken in execution; and by sect. 246 of the act, the directors themselves are exempted both in person and property from all liabilities for payment of such costs. That the defendant having, in December, 1841, received a letter from Sir G. S. demanding payment of certain monies alleged to be due from the defendant to the plaintiffs, the defendant wrote to the said Sir G. S. stating "that he had no shares on which any demand could arise, and that when, in 1839, the Company made a similar demand, he resisted it, and obtained judgment in his favour, and a written promise from their solicitors, that no further proceedings should take place against him, and if that were not satisfactory, he requested to be furnished with the names of the directors in order to bring the matter before them;" that no re-

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ply was made to that letter; that the defendant was afterwards served with the copy of a writ at the suit of the plaintiffs, issued by Sir G. S. as their attorney; that the defendant made a second application for the names of the directors to the agent of Sir G. S.; that all information on the subject was refused; and that the defendant did not know the names of the directors, but had since ascertained them. Other facts were then set forth to connect Sir G. S. with the Company, and to shew that statements contained in the prospectuses issued by the Company from time to time were false; and that by reason of the existing difficulties, Sir G. S. had given notice in the London Gazette of an intention on the part of the Company to apply to Parliament for a bill to authorize the abandonment of the said line of railway, and the substitution of a different line in lieu thereof.

The affidavits in answer denied most of the above allegations, and stated that the calls in question had been made and action commenced by the direction of the seven persons mentioned in the rule, who had been duly elected under the act. That the writ was issued in December, 1841, and issue joined on the 12th May, 1842, and notice of trial given for the sittings after Trinity Term then next. That the record was passed on the 21st of June, and the cause entered for trial, and was fixed to be tried on the 19th of December, but was made a remanet by consent. And that an act for extending and enlarging the former act received the royal assent on the 30th June, 1842, when there were only seven directors in the Company.

Talfourd and *Channell*, Serjts. (with whom was *Carey*), showed cause upon these last affidavits. The application is out of time. The defendant has pleaded several pleas, on which issue was joined, and the cause stood for trial at the sittings after Michaelmas Term, and was made a remanet. [*Tindal*, C. J.—We cannot try upon affidavits

what ought to be tried by a jury. When the rule was granted, I was not aware that the cause was ripe for trial.] The act requires twelve directors, but five are a quorum, and there have never been less than seven. It has been decided in this court, that the provisions relating to the appointment of directors are directory only: *The Thames Haven Dock and Railway Company v. Rose* (a). [*Cresswell*, J.—Can we inquire in a summary way whether these directors are legally appointed?] They are acknowledged to be a legal court by the 5 & 6 Vict. c. lxxxix, which was an act for extending the provisions of the former act; and at the time it was passed, the court of directors consisted of the same persons as when the action was brought.

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Bompas, Serjt., (*Petersdorff* with him), contra.—If the action was brought by the attorney, without authority, the proceedings may be set aside at any time, even after verdict: *Doe d. Hannuck v. Fillis* (b). [*Tindal*, C. J.—In that case the corporation disowned the act of the attorney; here the Company say they want to go on. *Cresswell*, J.—It appears in the secretary's affidavits, that the proceedings in this action were directed and sanctioned by the seven directors. You must shew misconduct or fraud.] If seven men call themselves directors, that is not enough to enable them to act. The defendant cannot plead, or give in evidence under the general issue, that the seven persons are not directors. It is hard, therefore, that he should not be able to protect himself by an application like the present. Then, there is no authority under the seal of the Company authorizing the attorney to bring this action, which is ground for the application. [*Tindal*, C. J.—It

(a) *Ante*, p. 178; 4 M. & G. 552; 2 Dowl., N. S., 104.

(b) 2 Chitty, 170.

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does not appear that there was not an appointment under seal, and that point was not mentioned on moving for the rule.] The onus is on the attorney to shew a valid appointment, and sect. 124 prevents that objection being raised by the defendant on the record or at the trial.

TINDAL, C. J.—It appears to me that this application may be answered on two distinct grounds. First, it is too late. The cause has been set down for trial, and, but for accident, it would have been tried. I cannot see why the defendant is to lie by so long, as it clearly appears from the affidavits that he has been long aware of the facts, and he ought to have applied as soon as they came to his knowledge. This observation applies still more strongly to the second objection, namely, that the attorney was not appointed under the seal of the Company, which was not mentioned when the rule nisi was moved for; but, for aught that appears, there may have been a proper authority under seal, which I think we have a right to assume, as nothing appears to the contrary. Besides this, I am of opinion that the application is substantially answered on the merits. I agree, that if seven strangers, unconnected with the Company, had called themselves directors, and authorized an attorney to bring an action in the name of the Company, that would have been a different case; but here the seven persons giving the authority were for a long time allowed to act as directors by the proprietors. If no new directors were appointed, the fault is in the proprietors, and the defendant in this action is one of them. Many of the enactments as to the election of directors are clearly only directory; and if the proprietors allow persons to act as directors, they may have no right to object in a court of justice that they were not properly elected. But it is not necessary to give an opinion on this point, as I think this application, founded on the alleged misconduct

of an attorney, and calling on him to pay costs, is clearly answered on the first ground, and that we have no right now by our interference to take away from the Company their right to have their case considered by a jury. The rule, therefore, must be discharged.

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ERSKINE, J.—I am of the same opinion. Attornies sometimes use the name of a party, and bring an action without authority. When this has been the case, the proceedings have been set aside upon an application sanctioned both by plaintiff and defendant. Here it is urged, that there were no competent directors, the action being brought in their names. This rule, however, was granted on the ground that the action was commenced merely at the instigation of the secretary, for purposes of his own, without the authority of the Company. Now, it appears from the affidavits, that the secretary did not so direct the action to be brought, and that seven persons who had been, and still are acting as directors, when called upon by this rule to shew cause, admit that they did so direct. It has been urged, that, by sect. 124, the objection to the appointment of the directors cannot be raised on the record, or taken at the trial. I think that section does not exclude such objection being raised ; but, if it does, it was probably because the Legislature thought it unfit to allow a shareholder to raise that question before a jury, and, if so, why should he be allowed to do so before the Court? He should have taken care that the Company were in a proper condition to carry on the business.

MAULE, J.—This is a motion to set aside proceedings on the ground that the action was not the action of the Company, the plaintiffs on the record; and it is now further objected, that the attorney bringing the action

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was not appointed under seal. But the defendant has pleaded several matters, without objecting to the authority of the attorney, and therefore admitting it. A rule has now been granted calling on the parties acting as directors of the Company to shew cause; they have appeared by their attorney, and shewn cause, not repudiating, but adopting the action. This is conclusive that the action is brought with their authority. This is an attempt by a shareholder to institute an inquiry into the internal affairs of the Company. If the shareholders do not object to what they consider a non-compliance with the statute, they must be deemed to have acquiesced in it; and it is not for them, when sued for calls, to set up such non-compliance with every minute direction of the statute as an answer to the action. But I think the rule must be discharged for this short reason: it was obtained on the ground that the action was not authorized by the directors of the Company—they appear and say they did authorize it.

CRESSWELL, J.—I am of the same opinion. The defendant has pleaded that he is not a shareholder. If that is so, he is in no danger from any claim upon him, and it is immaterial whether the directors gave authority or not: if he was a shareholder, he ought to have known the state of the Company, and made his application sooner. It is said, that, as by sect. 124 the defendant is precluded from pleading that the directors were not legally appointed, he is shut out from any other inquiry, and he may, therefore, come here now. But, if he is precluded from raising that question on the record, or before a jury, how can we suppose the Legislature to have intended that we should dispose of it in a summary way? The rule was obtained on the ground that the Company are not suing in this action; but the persons who have been acting as directors, who have been called upon to shew cause, appear here,

and expressly sanction the proceedings, and state that the action was brought by their direction.

Rule discharged, with costs.

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Bompas, Serjt., then applied for leave to plead special pleas, denying the legality of the appointment of the directors, so as to raise the question on the record.—The defendant should not be precluded from trying, in some way or other, the merits of the case. [*Tindal*, C. J.—The merits are, whether the defendant is a shareholder in the Company or not.] It is part of the merits that there is no legal call.

TINDAL, C. J.—I think not. There are many technical niceties relating to the proceedings of these Companies, and this objection may lie to the appointment of a single director. The defendant must have known all the facts when he pleaded.

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COURT OF QUEEN'S BENCH.

*In Hilary Vacation, 1843.**Feb. 3.*

STEPHENS v. DE MEDINA.

A railway act, 6 & 7 Will. 4, c. lxxvii, s. 147, enacts, that the shares shall to all intents and purposes be deemed personal estate, and not of the nature of real property; sect. 148 enacts, that the conveyance shall be in writing, and gives a short form of conveyance to be executed by the seller and purchaser:—*Held*, nevertheless, that, in order to enforce a contract for the transfer of shares, the purchaser must tender a conveyance to the vendor, as in the case of sales of real property. It is not, therefore, sufficient to aver in a declaration that the defendant promised, and was requested by the plaintiff to transfer the shares, and that the plaintiff was ready and willing to accept them, without averring the tender of a conveyance; but it is not necessary to aver a tender of the purchase-money.

ASSUMPSIT.—The declaration stated, that, heretofore, and after the passing of an act, (6 & 7 Will. 4, c. lxxvii) (a), to wit, on &c., the plaintiff, at the request of the defendant, bargained and agreed with the defendant to buy of the defendant, and the defendant then bargained and sold to the plaintiff divers, to wit, ten shares in the Cheltenham and Great Western Union Railway Company, established and incorporated under and by virtue of the said statute, at and for the price or sum of 1*l.* 2*s.* 6*d.* for each and every of the said ten shares, and which ten shares in the said Company the defendant then possessed, and represented that he was possessed of; each and every of the said ten shares to be made over and transferred by the defendant to the plaintiff in a reasonable time then next following; and in consideration thereof, and that the plaintiff, at the like request of the defendant, had then promised the defendant to accept and receive the said ten shares, and to pay him for the same at the rate or price aforesaid, he the defendant then promised the plaintiff to make over and transfer the said ten shares to the plaintiff as aforesaid, in a reasonable time then next following. And although the plaintiff hath always been ready and willing to pay the defendant for the said ten shares at the rate of 1*l.* 2*s.* 6*d.* each, as aforesaid; and although a reasonable time for the defendant to make over and transfer the said

(a) *Antè*, Vol. ii, p. 731.

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ten shares to the plaintiff hath long since, and before the commencement of this suit, elapsed; and although the defendant was afterwards, to wit, on &c., requested by the plaintiff to make over and transfer to him the said ten shares; and although the plaintiff hath always been ready and willing to accept and receive the same, of all which premises the defendant then and always had notice; yet the defendant, not regarding his said promise, did not nor would, when so requested as aforesaid, or at any other time, make over or transfer the said ten shares, or any or either of them, to the plaintiff, and hath hitherto wholly neglected and refused, and still wholly neglects and refuses so to do, whereby the plaintiff hath lost and been deprived of divers great gains and profits, which might and otherwise would have accrued to him from the possession of the said ten shares so to be made over and transferred to him as aforesaid, and from a re-sale and disposal thereof, which he might and otherwise would have made, and the price and value of the said shares has greatly increased, to a large amount, to wit, &c.; and thereby also the plaintiff, in order to purchase ten other shares in the said Company, hath been forced and obliged to pay, and hath paid a much larger price and sum than the said sum of 1*l.* 2*s.* 6*d.* each, to wit, 4*l.* each; and the plaintiff hath accordingly bought ten other shares in the said Company at 4*l.* each; and the plaintiff hath been and is, by means of the premises, otherwise much injured, &c.

Demurrer, assigning for causes that it does not appear by the declaration that the plaintiff did at any time tender to the defendant any deed of sale or transfer of the said shares, or of any or of either of them; whereas the tender of such deed of sale or transfer by the plaintiff was a condition to be done and performed by him precedent to the accruing to him of any right of action against the defendant for not transferring the said shares, as in the said

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declaration mentioned; and also for that the declaration does not aver that the plaintiff ever tendered or offered to pay the defendant the said price for the said shares, &c.—Joinder in demurrer.

Martin, in support of the demurrer(a).—The railway act (6 & 7 Will. 4, c. lxxvii, s. 148) (b) enacts, that the conveyance of shares shall be in writing, and gives a form for the purpose. To maintain this action, therefore, the purchaser should tender such conveyance, and the declaration should contain an averment that such tender has been made, it being a condition precedent to the right to declare on such a contract, as in the case of a sale of lands; *Pordage v. Cole* (c), 1 Sugden on Vendors, 374; *Baxter v. Lewis* (d); *Webb v. Bethell* (e); *Poole v. Hill* (f); and it makes no difference that sect. 147 declares that they “are to be deemed personal estate, and not of the nature of real property.” [He abandoned the objection as to the averment of the tender of the price, upon the authority of *Pickford v. The Grand Junction Railway Company* (g).]

Barstow, contra.—The reason given in Sugden for the rule that a purchaser should tender a conveyance is, that, “upon the introduction of modifications of estates unknown to the common law, and which brought with them all the difficulties that surround modern titles, it became usual for the purchaser to prepare the conveyance.” Here, however, that reason does not apply, as the act gives a short and simple form as sufficient for the purpose. It is alleged that the defendant in this case contracted, in consideration of the premises, that he would make over and

(a) Nov. 15th, 1843. Before
 Lord Denman, C. J., *Williams*,
Coleridge, and *Wightman*, Js.
 (b) Antè, Vol. 2, p. 732.
 (c) 1 Saund. 320 d.

(d) Forrest, 61.
 (e) 1 Lev. 44.
 (f) 6 M. & W. 835.
 (g) Antè, Vol. 2, p. 592; 8 M.
 & W. 372.

transfer the shares to the plaintiff in a reasonable time, so that it is clear that the act of transfer was to originate with the defendant. Even supposing a tender of the conveyance had been made, the defendant might have broken his contract in other ways than by refusing to execute it.

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Martin, in reply.—The declaration does not suggest that the contract was broken in any other way than that the defendant, when requested, neglected to transfer the shares, on which issue it was incumbent on the plaintiff to shew that he tendered a conveyance.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.—This was an action for not transferring to the plaintiff ten shares in the Cheltenham and Great Western Union Railway, and the plaintiff alleges that he was always ready to pay the stipulated price and accept the transfer; that he has requested the defendant to make the transfer, and that a reasonable time has elapsed for the making it, but he does not aver that he tendered to the defendant any conveyance for execution; and the question raised upon special demurrer is, whether such tender is a condition precedent to the maintenance of the action. Upon the argument it was not denied, that, in the conveyance of real property, where no special provision is made in the contract, the expense of the conveyance falls upon the purchaser, nor that, in such a case, in the absence of any stipulation to the contrary, it becomes his duty to prepare and to tender such conveyance; neither was it disputed that the same practice prevailed with regard to terms for years; but it was argued that in all these cases the rule had been established, because, generally, there was or might be more or less of complexity of title or in the mode of conveyance, and that, as the purchaser was to

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secure himself in respect of the former, and to prescribe all the peculiarities which he insisted on in the latter, it was proper that his legal adviser should prepare the instrument; and it was insisted on that this reason did not apply in a case like the present, where the form of conveyance was simple, and prescribed in terms by the act of Parliament. It does not appear to us that this is the true reason of the rule, which seems rather to be a consequence from the fact that the purchaser is to pay for the conveyance, the contract on the part of the vendor being simply this—"In consideration of such a sum, I will execute any proper conveyance of the estate which you tender me."

But, whatever be the true ground for the rule, whether this alone, or partly for the security of the purchaser, it appears to us that we ought not to introduce a different rule in the present case, even if the same reasons do not exist in full force, unless there be some inconvenience or injustice in adhering to it. Conveyances of property of this description, and under similar circumstances, are becoming exceedingly frequent; they have now been in use for some time, and we do not find that any practice has grown up varying from the uniform rule as to sales of land or leases for terms of years. There is, therefore, a clear convenience in its being understood that one uniform rule will be maintained: some expense must be incurred in the necessary stamps, if in no other way, and if nothing is said in the contract, this must, on general principles, fall on the purchaser: the vendor is to receive the purchase-money in full, and, if so, it is reasonable that the purchaser should do what he is to pay for. If he is to prepare the instrument, it is with him, and he must tender it to the vendor for execution before he can maintain any action for the non-transfer. We therefore think the demurrer sustained, and our judgment must be for the defendant.

Judgment for the defendant.

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COURT OF EXCHEQUER.

In Easter Term, 1843.

BISHOP v. NORTH.

May 1.

BY the order of the Vice-Chancellor of England, the following special case was sent for the opinion of this Court:—

By an act of Parliament passed in the 32 Geo. 3, intituled “An act for making and maintaining a navigable canal from the Cromford Canal in the county of Nottingham to or near to the town of Nottingham, and to the River Trent near Nottingham Trent Bridge, and also certain collateral cuts therein described from the said intended canal,” reciting “that the making and maintaining a canal for the navigation of boats, barges, and other vessels from &c. to &c., and also the making and maintaining the several collateral cuts thereafter mentioned, with proper railways and roads to the said intended canal and collateral cuts, would open an easy communication between several valuable mines of coal and the town of Nottingham, and the country with which the said intended canal and collateral cuts would communicate by means of the river Trent, and would facilitate the conveyance of stone, limestone, lead, iron, marble, corn, groceries, and other articles, for the accommodation of the said town of Nottingham, and the country with which the said canal and collateral cuts would communicate as aforesaid, and would be of public benefit:” it was enacted, that certain persons therein named “should be a Company for the better carrying on, making, completing, and maintaining the said intended canal and collateral cuts, according to the rules, orders, and directions

By a canal act (32 Geo. 3, c. c., s. 54), the proprietors of any mines of coal within certain parishes are empowered to make any railways or roads to convey their coals, &c. to the intended canal over the lands of any person, first paying or tendering satisfaction for damage, &c.:—

Held, 1st, that this power of making railways was not limited to persons who were proprietors of coal-mines at the time of the passing of the act or of making the canal, but extended to subsequent proprietors.

2nd, that they were empowered to make railroads to be traversed by locomotive engines, though they were not in use when the act was passed.

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thereinafter mentioned, and should for that purpose be one body politic and corporate, by the name of the Nottingham Canal Company, &c. And the said Nottingham Canal Company were thereby authorized and empowered, from and after the passing of that act, to make and complete a canal navigable and passable for boats, barges, and other vessels from the Cromford Canal, in the manner therein mentioned, to, and to join and communicate with the river Trent, with collateral cuts therein mentioned, and with the usual and necessary appurtenances, in the said act particularly mentioned and described." And, by the 54th section of the said act, it was enacted, "that, in case any proprietor or proprietors of any manor or estate containing any mines of coal, ironstone, or other minerals, or the renters, lessees, or occupiers of the same, should find it expedient or necessary to make any railway or roads to convey his, her, or their coals, ironstone, limestone, marble, or other stone, or minerals, to the said intended canal and collateral cuts, over the lands and grounds of any person or persons, then and in every such case it should be lawful for him, her, or them to make any such railway or roads, he, she, or they first paying or tendering satisfaction for the damages to be thereby occasioned to such lands or grounds, in manner therein directed with respect to land to be taken for the purposes of the now stating act; and that it should also be lawful for the owner or owners of, and person or persons interested in such lands or grounds, to treat and agree with any such proprietor, renter, lessee, or occupier, for the damage to be done to such lands or grounds by making any such railway or roads," &c. And by the 57th section it was further enacted, "that it should be lawful for the proprietor or proprietors of any lands or grounds, or of any mines of coal, ironstone, limestone, or other minerals, to make any navigable cut or cuts through his, her, or their own lands, in such manner as he, she, or they should think proper, to communicate with the said intended canal or

collateral cuts, or any of them." And by the 58th section of the said act, after reciting "that it was reasonable that the several owners and occupiers of coal-mines within the parishes of Bilborough, Broxtowe, Nuthall, and Basford, and the neighbourhood thereof, being situate near the intended canal, should have a free communication between their said coal-mines and the said intended canal, and reciting that such communication might be effected by making a navigable cut from the said intended canal in the parish of Wollaton, through the lands of Henry Lord Middleton, into the parish of Bilborough, and that the said Henry Lord Middleton was consenting that such cut should be made through his lands," it was therefore enacted, "that it should be lawful for the owners or occupiers of any mines of coal within the parishes or hamlets of Bilborough, Nuthall, and Basford, or any of them, at his or their own expense, to make a navigable cut from, and to communicate with the said intended canal at the east end of the summit level thereof, in as direct a line as might be through the lands of the said Henry Lord Middleton, to the said parish of Bilborough, to or near to a certain fence within the said parish therein described, and also to make a proper towing-path on the side of such cut, the person or persons who should make such cut making satisfaction for the damage to be thereby occasioned to the lands of the said Lord Middleton, his heirs or assigns, in the manner by that act directed; and that such cut should be public and open to all persons for the conveyance of any goods, wares, or other things in boats and other vessels, upon payment to the person or persons at whose charge and expense such cut should have been made, his, her, or their heirs, executors, administrators, or assigns, of such sum of money in gross, or such yearly rent, as the said commissioners should judge reasonable on account of the expenses of making and maintaining such cut; and that the owners or occupiers of any mines of coal should have the like powers and authorities

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for making any railway from any such mines of coal to the north end of the cut to be made to the said parish of Bilborough, as aforesaid, as they were or should be entitled to by virtue of that act for making railways to the said canal and collateral cuts."

The canal mentioned in the said act was made and completed by the said Nottingham Canal Company, under the powers of the said act, in about two years after the passing thereof; and some time in or about the years 1798 and 1799, the cut mentioned and provided for in and by the 58th section of the said act was made according to the terms thereof, and is now called the Bilborough Cut.

The defendants are coal masters and coal owners, trading in co-partnership together, and are joint proprietors, renters, lessees, or occupiers of certain collieries situate in the parishes of Shelly, Nuthall, and Basford, respectively, and of certain collieries situate at Babbington, called the Babbington Collieries.

Some years since, by virtue of the said Nottingham Canal Act, a railway was made by one Gervase Bourne, who preceded the defendants in the occupation of the said Babbington Collieries, from the said Babbington Collieries to the said Nottingham Canal, which railway still exists, and is used by the defendants to convey coals and minerals to the said Nottingham Canal, and by the canal to Nottingham. The defendants some time since, with the consent of the owners of the lands, made a certain other railway communication with the railway before mentioned at the Babbington Collieries, and passing through the parishes of Bilborough and Nuthall to a place called Cinder Hill; and a junction with such last-mentioned railway has been formed by the said defendants at Cinder Hill by means of a railway made to communicate with a certain intended colliery called the Nuthall Colliery.

The defendants intend to obtain and raise coals and other minerals from the said Nuthall Colliery, and they

propose forming a railway, fitted for the use of locomotive steam-engines, from their said colliery, through the parishes of Basford, &c., to join the said Nottingham Canal.

The plaintiffs are the owners of certain lands lying on the line of the proposed railway, and they are not consenting to have their said lands crossed by, or used for the purposes of such proposed railway.

A railway from the Nuthall Colliery to the north end of the Bilborough Cut would not pass through any lands belonging to the plaintiffs.

The questions for the opinion of the Court are—First, Whether the defendants have a right to make a railway over the said plaintiffs' land, under the provisions of the said act; Secondly, Whether they have a right to make a railway over the plaintiffs' land for the purpose of being traversed by locomotive engines.

The points marked for argument on the part of the plaintiffs were the negative of the questions proposed. The defendants' points were, that they were empowered by the 54th section of the Canal Act to make a railway from the Nuthall Colliery to the canal; that the act, having given the power to make railways *generally*, without any restriction as to their construction, or as to the mode in which they are to be used, the defendants have a right to make them for the purpose of being traversed by locomotive engines. That, at all events, there can be no legal objection to the defendants so constructing their railway as that it may admit of being traversed by locomotive engines as well as by animal power. That, if the use of locomotive engines would be injurious to the plaintiffs, the time to object to the use of them will be when the defendants begin to use them.

Whitehurst, for the plaintiffs.—The defendants do not fall within the provisions of the act, which apply only to those who were proprietors and owners at the time of its

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passing, or, at all events, while the canal was making. They have, therefore, no authority to make this railway; the act, being private, must be construed strictly against private individuals: 2 Dwarries on Statutes, 688. Besides, this is not a compliance with the 58th section, which requires that such railway should be made to the north end of the Bilborough Cut.

Secondly—The defendants are not authorized to make a railway to be traversed by locomotive engines, which were unknown at the time of the passing of the act. They are restricted to such railways as were then in existence. [*Parke, B.—Dand v. Kingscote (a)* decides that the words “sufficient wayleave” do not limit the parties to such description of way only as was in use at the time of the grant.] It is questionable whether that case gives power to make such railways as those now in use, which require deep cuttings and embankments, so as, in effect, to exclude the owner of the soil.

Humfrey, contra, was not called upon by the Court.

PARKE, B.—I think the defendants in this case have a right to make the proposed railway for carrying coals by any reasonable means. The power given by the act is to make *any* railway, and it is not shewn that the term “railway” has any definite meaning requiring it to be made on a level, or that it can be qualified by shewing that at the time of the passing of the act a particular description of railway, unlike the one contemplated, was in use in the county of Nottingham, or even in England. The power is general, to make railways over the lands or grounds of any person or persons, making satisfaction for the damages to be occasioned thereby. The railroad in question must, however, be properly adapted to the purpose, and reason-

(a) *Antè*, Vol. 2, p. 27; 6 M. & W. 174.

able care must be taken that it does not become a nuisance to the public, or to individuals.

ALDERSON, B.—The defendants are entitled to make any railroad embracing the latest improvements in existence when they make the road; subject to the restriction that they are not to cause a nuisance to individuals or the public.

ROLFE, B., concurred.

The following certificate was afterwards sent to the Vice-Chancellor of England:—

1. We have heard this case argued by counsel, and have considered the same, and are of opinion that the defendants have a right to make a railway over the plaintiffs' land under the provisions of the act of Parliament mentioned in this case.

2. We are of opinion that the defendants have a right to make such a railway over the plaintiffs' land, properly constructed for the purpose of being traversed by such locomotive engines, if any, as can be used for the purposes in the act mentioned, without occasioning any public or private nuisance. Dated this 2nd day of May, 1843.

J. PARKE.

E. H. ALDERSON.

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In Easter Vacation, 1843.

May 10.

THE QUEEN v. THE EASTERN COUNTIES RAILWAY
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Where an inquisition has been duly held before the sheriff to assess damages in pursuance of a precept issued by a Railway Company, under their act, (6 & 7 Will. 4, c. cvi), which provides (sect. 29) that such verdict shall be final, the Court refused an application for a mandamus to compel the issuing of a new precept, though made on the ground of misdirection, of the improper rejection of evidence, of the verdict being against evidence and the damages grossly insufficient.

THIS was a motion for a rule calling upon the Eastern Counties Railway Company to shew cause why a mandamus should not issue, commanding them to issue their precept to the sheriff of Essex to summon and impanel a jury to inquire into and assess to a Mr. Finch his damages occasioned by the construction of certain works of the said railway.

James moved on affidavits, which stated that Finch was tenant from year to year, and occupier of certain premises situate in Chelmsford; that the fee simple of a portion of those lands was purchased by the Eastern Counties Railway Company for the purpose of constructing the railway thereon; and that they also temporarily used a portion of the remainder of the land, by passing to and fro across the same with carts, horses, and workmen, under the provisions of the acts (6 & 7 Will. 4, c. cvi, and 1 & 2 Vict. c. xxxi) by which the construction of the railway was authorized. Mr. Finch having claimed compensation for the damage done to his premises by the Railway Company, a precept was issued by them to the sheriff of Essex to summon and impanel a jury to assess satisfaction, recompense, or compensation for damage before that time done to, and sustained by him, on and about the land now or formerly in his occupation, &c., by reason of the execution of any of the works by the said acts authorized, at, upon, or near to the said lands, or for the future temporary or perpetual or for any recurring damage to be done to or sustained by him, as aforesaid. At the trial of the inquisition, Mr. Finch tendered evidence of damage done to the growing crops on

his land by the construction of the railway, and also by the temporary use of a portion of his land by the Company. In support of this, he offered to prove that a temporary road had been made over his meadow, destroying the pasturage, but that the meadow had in other respects always remained under his control. The under-sheriff, however, objected to this evidence, upon the ground that, by the 50th section of the first act, authority was given to justices, upon complaint made to them, to award damages in respect of the temporary occupation of any land, and withdrew this branch of the case from the consideration of the jury. In this respect it was submitted there had been a misdirection, the provisions of the 50th section not being applicable to a mere user, but only to an actual occupation of land. The verdict, also, was against the evidence; Mr. Finch had originally claimed £542; by his witnesses, he proved damages to the amount of £411; the Company, by their witnesses, shewed that the damage was 152*l.* 10*s.*, but the jury awarded only £49. Although it must be admitted that this is an application in the nature of a motion for a new trial, and that doubts exist whether in such case a new trial could be had, as, by sect. 29, the verdict is made final; yet, if the Court see that obvious injustice has been done, it will not hesitate to put a party in a position to maintain his rights. [He cited *Regina v. The Sheffield, Ashton-under-Lyne, and Manchester Railway Company (a).*]

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Cur. adv. vult.

COLERIDGE, J., now delivered judgment.—This was an application for a rule calling upon the Eastern Counties Railway Company to shew cause why a writ of mandamus should not issue, commanding them to issue a precept to the sheriff of Essex to summon a jury to assess damages for in-

(a) *Antè*, Vol. 1, p. 537; 11 A. & E. 194.

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jury alleged to have been sustained by a person named Finch, by reason of the works of the Company's railway. It appeared that, in point of fact, such a precept had already issued, and that a jury had sat under it to assess damages in respect of all the causes of damage for which compensation is now sought to be obtained, and that they returned a verdict for the sum of £49. It is said that this is a sum grossly under the amount which Mr. Finch is entitled to claim, that he proved damage to the amount of nearly £500; and the insufficiency of the verdict is attributed to two causes: one, that the sheriff excluded one entire set of damages from the consideration of the jury, on the ground that they were properly recoverable under a particular section of the Company's act before a justice; another, that, although the claimant proved a much larger amount of damage than that found, the jury, from some personal cause, chose to give a verdict for an inadequate amount. It was admitted that a direct motion for a new trial could not be made, and no doubt that was a proper admission, for the proceeding is the creature of the act of Parliament, and the section of the act by which it is directed that such a proceeding shall be had makes the verdict final; but, even if this be not so, I am at a loss to see what machinery this Court has to direct a new trial. But it was said that the Court might direct a second precept to issue; it appears to me, however, that, if I acceded to such a proposition, I should only be doing a thing indirectly which cannot be done directly. If a mandamus should go, the return would be that a precept has already been issued; then the reply would be, "Yes; but justice has not been done under that precept." So that, in point of fact, it would still come to the same thing, that the Court would be called upon to grant a new trial. I am informed that a like application has been made in the full Court in another case, and that it was refused. I do

not know whether injustice has been done or not, but, even if it has, I have no power to interfere, and no rule therefore can go in this case.

Rule refused.

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COURT OF EXCHEQUER CHAMBER.

In Easter Vacation, 1843.

THE AYLESBURY RAILWAY COMPANY v. MOUNT.

May 13.

A WRIT of Error, brought by the plaintiffs upon the judgment of the Court of Common Pleas in this case (a), came on for argument in this Term (13th of May, 1843), in the Exchequer Chamber, before Lord Abinger, C. B., Pat-

By a railway act (6 W. 4, c. lxxxvii) the Company are authorized (s. 95) to sue subscribers who neglect to pay

the calls on their shares. Sect. 96 empowers the directors to make calls of money from the subscribers and proprietors for the time being, and, in default of payment, to sue for the calls, or to declare the shares forfeited. Sect. 98 provides, that, in an action against such proprietor for the time being, it shall be sufficient to declare that the defendant, being a proprietor of a share, is indebted in £— for a call, whereby an action hath accrued to the Company, without setting forth the special matter; and sufficient to prove that the defendant, at the time of making such call, was a proprietor of a share, and that the call was made, and notice given as directed by the act. Sect. 101 enables proprietors to sell their shares; providing, that, on every such sale, the deed or conveyance executed by the seller and purchaser shall be kept by the Company, who shall enter in a book a memorial of the transfer, and indorse the entry thereof on the deed, and on the certificate of the share sold; and, until such memorial shall have been made and entered, the seller shall remain liable for calls, and the purchaser shall have no part of the profits, nor interest paid, nor vote in respect of such share. Sect. 102 prohibits the sale by any person of any share on which a call shall have been made after the day appointed for payment of the same, unless at the time of such sale he shall have paid the full sum called for in respect thereof.

In an action for calls, the declaration stated, that the defendant, having before the commencement of the suit been a proprietor of shares, *was* indebted to the Company for a call on each of such shares, and that, by reason of the calls remaining unpaid, the defendant still *is* indebted, and an action has accrued to the plaintiffs. Plea, that the call was made payable on —; and that the defendant transferred his shares by deed to one C. T., and that the Company entered a memorial of the transfer, according to the provisions of the act, before the call was payable.—Verification. On special demurrer to this plea:—

Held, reversing the judgment of the Court below, that the plea was bad, as being an argumentative denial that the defendant was ever indebted to the Company, and that the declaration was good on general demurrer.

(a) *Antè*, Vol. 2, p. 679; 5 Scott, N. R. 127; 2 Dowl. N. S. 143.

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teson, Coleridge, and Wightman, Js., and Parke, Alderson, and Rolfe, Bs.

Bovill, for the plaintiffs in error, in addition to the arguments and cases in the Court below, cited *The Edinburgh, Leith, and Newhaven Railway Company v. Hebblewhite (a)*.

B. Andrews, contra, cited also *Carr v. Hinchcliff (b)*.

LORD ABINGER, C. B.—I am of opinion that the declaration in this case, though not literally in conformity with the 98th section of the act, is sufficient. It states that the defendant *was* a proprietor, and that he *is* indebted, which, according to the true meaning of that section, is clearly good on general demurrer. As to the plea, I see no way of escaping from this: that it amounts in substance to a denial that the defendant was ever indebted to the Company; in other words, it is an argumentative general issue.

The rest of the Court concurred.

Judgment reversed.

(a) *Antè*, Vol. 2, p. 237; 6 M. & W. 707; 8 Dowl. 802. (b) 4 B. & C. 547; 7 D. & R. 42.

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COURT OF CHANCERY.

BEFORE THE MASTER OF THE ROLLS.

BARNESLEY CANAL NAVIGATION COMPANY v. TWIBILL.

18th Nov.

THIS was a motion to dissolve an injunction which had been granted on the 11th May then last, to restrain the defendant from proceeding before a jury summoned by the commissioners under the Barnesley Canal Navigation Act, (33 Geo. 3, c. cx (a)), to ascertain the compensation

Under a canal act the land over which the canal passed was purchased by the Company, but the coal-mines and coal were reserved to the

owners, their heirs and assigns, who were to be at liberty to work the mines *so as not to injure the canal.*

A., the owner of land over which the canal passed, sold it to the Company, and afterwards leased the coal up to the side of the canal on one side, and up to the towing-path on the other, to B.

A. subsequently contracted with the Company for the sale to them of the coal under the canal and towing-path, and eight yards on each side, which they required for the safety of their canal.

Held, that B. was entitled to compensation in respect of the interest in the coal which he had acquired under the lease, viz. the profit to be derived from the coal when gotten, after deducting the expenses of getting it.

Where the Legislature has provided a competent tribunal, and has given to it a certain jurisdiction, and made its decision final, no equity can be founded on an allegation that such tribunal is incompetent to decide questions properly within its jurisdiction. If any inconvenience arise from the legal exercise of that jurisdiction, the Legislature alone can apply a remedy.

(a) The material sections of the act were the following:—

Sect. 23. "That all persons [qualified as therein mentioned] shall be, and they are hereby accordingly appointed commissioners for the settling, determining, and adjusting of all questions, matters, or differences which shall or may arise between the said Company of proprietors and the several owners of, and persons interested in, any lands, &c. which shall or may be taken for, or affected, damaged, or

prejudiced by, the execution of all or any of the powers hereby granted, and for other the purposes herein-after mentioned."

Sect. 27. "That, upon application to be made by the said Company of proprietors, or any five or more of them, or by the owners or occupiers of any grounds, lands, tenements, or hereditaments, to be affected by the said canal, or any of the works necessary or relating thereto, or any of them, unto the commissioners appointed by and

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to which the defendant was entitled, for his interest in certain coal which the plaintiffs required to be left for the security of their canal.

for the purposes of this act, or unto any three or more of them, requesting or desiring them to appoint a general meeting of the commissioners, the commissioners so applied to shall, and they are hereby respectively authorized and required, within ten days after such request or application made, to give notice in manner aforesaid of a general meeting to be held at such time and place as shall be specified in such notice," &c.

Sect. 30. "That the commissioners acting in any question, matter, or difference which shall or may arise, are hereby authorized and empowered by writing under their hands, with the consent of the parties concerned, to *determine and adjust* from time to time what sum or sums of money shall be paid by the said Company of proprietors, either by an annual rent or payment, or by a sum of money in gross, to and at the election of such bodies politic, corporate, or collegiate, person or persons respectively, who shall be so entitled or interested as aforesaid, for the absolute purchase of the lands or grounds which shall be set out and ascertained for making the said intended canal and other works and conveniences, or any part thereof, and other the purposes of this act, and also to determine and adjust what other distinct sum or sums of money shall be paid by the said Company of proprietors as a recompense for any damages which may or shall at

any time or times whatsoever be sustained by such bodies politic, corporate, or collegiate, or any person or persons respectively, being owners of and interested in any lands, &c., by reason of the severing or dividing the same, or the making, repairing, or maintaining the said intended canal, &c., in case such price or value, damages, and recompenses respectively cannot be settled, adjusted, and agreed for by and between the said Company of proprietors, or their agents, and such proprietors of, or persons interested in, the said lands, &c., as aforesaid. And if the said Company of proprietors, for and on the part and behalf of themselves or any such body politic, corporate, or collegiate, trustee or trustees, or other person or persons interested or entitled as aforesaid, for and on his, her, or their part or parts, shall refuse to submit any such matter to the determination of the said commissioners, or shall be dissatisfied with any determination which shall be by them made as aforesaid, or if any such bodies politic, corporate, or collegiate, trustee or trustees, or any other person or persons entitled or interested as aforesaid, shall refuse to receive, upon due tender thereof made, such purchase-money or annual rent, or such recompense as shall be so determined to be paid, or shall upon notice in writing given to the principal officer or officers of such bodies politic, corporate, or collegiate, or

The injunction had been granted on the plaintiffs undertaking to do all necessary acts to facilitate the trial in

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to such trustee or trustees, person or persons respectively, or left at the last or usual place or places of his, her, or their abode, or with the tenant or tenants, occupier or occupiers, of such lands or grounds, for the space of twenty-one days next after such notice, neglect or refuse to treat, or shall not agree with the said Company of proprietors, or by reason of absence shall be prevented from treating, or through disability by non-age, coverture, or other impediment, cannot treat for themselves or make such agreement as shall be convenient for promoting the navigation and other the works aforesaid, or shall not produce and evince a clear title to the premises which they are or shall be in possession of, or to the interest they claim therein, then and in every such case the said commissioners shall and they are hereby empowered and required from time to time to issue a warrant or warrants under their hands and seals to the sheriff of the said county of York for the time being, and in case the said sheriff or his undersheriff shall happen to be one of the said Company of proprietors, or enjoy any office of trust or profit under them, or shall be otherwise interested in the matter in question, then to some one of the coroners of the said West Riding of the county of York not interested as aforesaid, commanding such sheriff or coroner respectively to impanel, summon, and return a jury [in manner therein mentioned],

and the said commissioners are hereby empowered to summon and call before them all and every such person or persons who shall be thought necessary to be examined as a witness or witnesses touching the matter in question; and the said commissioners may order and authorize the said jury, or any six or more of them, to view the place or places, or matters in controversy, which jury, upon their oaths, (which oaths, as well as the oaths to such person or persons as shall be called upon to give evidence, the said commissioners are hereby empowered to administer), shall inquire of, assess, and ascertain the sum of money or annual rent to be paid for the purchase of such lands, grounds, tenements, or hereditaments, or the recompense to be made for the damages that may or shall be sustained as aforesaid, and shall assess separate damages for the same; and the said commissioners shall give judgment for such purchase-moneys, rent, or recompense so to be assessed by such jury, which said verdict, and the judgment thereupon, pronounced as aforesaid, shall be signed by the said commissioners, and shall be binding and conclusive to all intents and purposes against the Queen's Majesty, her heirs and successors, and against all bodies, politic, corporate, or collegiate, and all other persons whomsoever, and shall not be removed by certiorari or other process whatsoever into any of her Majesty's courts of re-

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respect of the compensation claimed by the defendant, in case the injunction should be dissolved.

cord at Westminster or any other court, any law or statute notwithstanding." [Then follow penalties in case of default by sheriff and other persons in the premises.]

Sect. 38. "That the said commissioners may and are hereby empowered to settle what shares and proportions of the purchase monies or recompense for damages, which shall be agreed for by the said Company of proprietors, or determined and adjusted by the said commissioners, or assessed by the said juries in manner respectively, as aforesaid, shall be allowed to any tenant or other person having a particular estate, term, or interest, in the premises, for his, her, or their respective interests therein, except in such cases where the same is or are herein directed to be laid out as aforesaid."

Sect. 40. "Provided that nothing herein contained shall extend to defeat, prejudice, or affect the right of any lord or lords, lady or ladies, of any manor or manors, or of any owner or owners of any lands or grounds, in, upon, or through which the said canal, railways, or other roads, or any towing-path, wharfs, quays, trenches, sluices, passages, watercourses, or conveniences shall be made, to the mines or minerals lying and being within and under the lands or grounds to be set out or made use of for such canal, &c., or any of them, but all such mines or minerals are hereby reserved to such lord, &c. and their heirs, executors, administrators, and assigns, respectively, and that it shall be lawful for the

lord &c., (subject to the conditions and restrictions herein mentioned), to work, get, drain, take, and carry away, to his, her, or their own use, such mines and minerals, not thereby injuring, prejudicing, or obstructing the said intended canal, &c., anything herein contained to the contrary notwithstanding."

Sect. 41. "That, if the owner or worker, owners or workers, of any coal or other mine or mines shall, in pursuing such mine or mines, work so near, in the opinion of the said Company of proprietors, to the said intended canal, as to endanger or damage the same, or, in the opinion of the said owner or worker, owners or workers, of the said mine or mines, to endanger or damage the further working thereof, then it shall be lawful for the said Company of proprietors to treat and agree with the owner or worker, owners or workers, for all such coal or other minerals as may be near or under the said canal, as shall be thought proper to be left for the security and preservation of the said intended canal, or other works, or mine or mines, as aforesaid; and in case the said Company of proprietors and such owner or worker, owners or workers, of such mine or mines shall disagree about the satisfaction to be made for such coal or other minerals, then it shall be lawful for the said commissioners, at the request of the said Company of proprietors or of such owner or worker, owners or workers, of such mine or mines, to cause a jury to be summoned and impanelled in the

The bill (filed 8th May, 1843) stated the Barnsley Canal Navigation Act, and that the canal by that act authorized to be made had been completed and used for a period of forty years.

That the Company had purchased part of the land through which the canal passed from the predecessors of T. W. Beaumont, Esq.

That the coal was not worked by the owners at the time of the purchase of the land by the Company, but that soon after such purchase collieries had been established.

That, in the month of February, 1840, notice was given by T. W. Beaumont, that the colliery works were approaching so near to the canal, that, in his judgment and opinion, the working of the mine would endanger the canal; and the Company were required by the said T. W. Beaumont to point out the boundary to which they wished the coal under or near the canal to be reserved, and to treat for the same.

That, in pursuance of this notice, the Company required the coal by the side of the canal for eight yards in width on each side to be reserved, and the Company ultimately agreed for, and purchased such coal at £200 per acre, and paid £756 as the purchase-money to T. W. B., and by indenture of the 4th October, 1842, the same was conveyed to the Canal Company.

That, at the time the said T. W. B. gave the Company

manner hereinbefore directed, who shall and they are hereby authorized and required by such ways and means as aforesaid to assess and determine what satisfaction such owner or worker, owners or workers, of such mine or mines ought to have and receive from the said Company of proprietors, for being restrained from working such mine or mines, and upon payment or satisfaction made to such owner

or worker, owners or workers, of such mine or mines by the said Company of proprietors, according to the verdict or judgment of such jury, such owner or worker, owners or workers, of such mine or mines shall be and they are hereby perpetually restrained from working such mine or mines within the limits for which such satisfaction shall, by the said jury, be adjudged and declared to extend."

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notice to treat for and purchase the coal, the defendant J. Twibill was the tenant of the said coal and mines.

That the said J. Twibill, on the 13th February, 1840, gave notice to the Company, that, in addition to the notice given by T. W. B., he was ready and willing to treat with the Company for such coal as the Company might require to be left for the safety of the canal, and, in case of disagreement, to abide by the verdict of a jury. That, in reply to such notice, the Company gave J. Twibill notice to leave the coal ungotten for eight yards on each side of the canal, and, if he had a just claim to any such coal, he was desired to specify and deliver an account of the same to the Company or their agents forthwith, who would treat for so much of such coal as the said J. Twibill might be legally entitled to.

That, on the 5th July, 1840, the said J. Twibill sent to the Company a notice claiming 551*l.* 4*s.* 1*d.*, as the value of such coal.

That the claim made by the said J. Twibill related to the coal belonging to the said T. W. B. as owner, which had been purchased by the Company, and also to a further sum which the said J. Twibill claimed to be entitled to receive as tenant under the said T. W. B. in respect of tenant's profits.

That the said J. Twibill was not entitled to any compensation for tenant's profits, and therefore the Company had refused to treat with the said J. Twibill.

That, on the 10th February, 1843, the said J. Twibill, caused a notice to be served on the Company, to the effect that, if the Company neglected to treat with him within twenty days, he should apply to the commissioners to cause a jury to be summoned, to determine the amount of compensation he was entitled to.

That the said J. Twibill had called a meeting of certain persons assuming to act as commissioners, who had issued a warrant to the sheriff for the purpose of summoning a jury to assess the compensation due to him.

The bill charged (among other things) that, inasmuch as the defendant J. Twibill claimed to have an interest in the coal as the worker thereof, the proceedings threatened to be taken by him before the jury would appear upon the face of them to be regular and authorized by law; and inasmuch as any inquisition to be made by the said jury, in respect of the claim of the defendant J. Twibill, was by the said act of Parliament not capable of being removed by certiorari into any of her Majesty's Courts at Westminster, the legality of the proceedings under such inquisition could not be inquired into by any Court of common law, and the Company would be concluded by the finding of the jury, and would be without remedy in case compensation should be improperly assessed in favour of the defendant J. Twibill; and the bill prayed, "that it may be declared, that the said J. Twibill is not entitled to any compensation, under or by virtue of the said act of Parliament, in respect of the matters and things claimed by him, and by his notice dated the 11th of February, 1843, from the said Barnsley Canal Navigation Company; and that the said J. Twibill, his solicitors and agents, may be restrained by the order and injunction of this honourable Court from appearing or producing any evidence before the said jury so as aforesaid summoned, pursuant to the warrant of the commissioners under the said act for the 16th of May instant, for the purpose of establishing the claim of him the said J. Twibill to compensation, in respect of any of the matters or things mentioned or claimed by him in his said notice of the 11th of February, 1843 (a)."

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Mr. *Turner* and Mr. *Glasse*, in support of the motion.—This Court has not any authority to decide this question, and ought not to interfere; a final tribunal is appointed by the act of Parliament, and there are no equitable circumstances

(a) The facts appearing on the evidence are stated in the judgment.

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to entitle the plaintiffs to come to the Court of Chancery for relief. The Canal Company have resisted all attempts made by the defendant to proceed to an inquiry in the only manner pointed out by the act. They have assumed power under their act, and yet, when the provisions of it do not suit them, they wish to repudiate it. The act is clear; it contemplates both owner and occupier. The argument on the bill is, that the owner could not lease his mines except subject to the provisions of the Company's act, but in s. 40 (a) there is a special reservation in favour of mines. The act is to be construed favourably to the public, whose rights are to be compulsorily affected, and strictly against those who apply for and take benefits under it. The lessee is to all intents and purposes the owner of the coal, subject only to the rent reserved to the landlord. The coal is in the nature of crops, which are the profit of the tenant, and it can hardly be contended, that, if the Company were to enter upon the surface, they would not first be obliged to compensate the tenant for his crops. The payment made by the Company to Mr. Beaumont was for the reserved rent in respect of the piece of land taken, not in respect of the value of the coal, which belongs exclusively to the worker of that coal. The Company do not say that the defendant is not justified in making any claim; they only say the claim is excessive, and refuse to go to the competent tribunal where the amount may be decided. If the Company have provided for themselves an objectionable tribunal, they must abide by it. This Court will only interfere to ascertain the legal and equitable rights of parties, so as to put them into a legal course of investigation, but will not interfere where a competent tribunal is provided for by the act: *Kemp v. The London and Brighton Railway Company* (b), *Clarence Railway Company v. Great North of England Railway Company* (c).

(a) Antè, p. 436. (b) Antè, Vol. 1, p. 495. (c) Antè, Vol. 2, p. 763.

Mr. *Pemberton Leigh* and Mr. *Daniel*, for the Company, in support of the injunction.—The Company have in themselves the statutory right of pre-emption, and an owner of land leasing a mine subsequently to the passing of the act, leases it subject to the provisions of the act, and is prevented from working any coal but that which the owner had the power to sell and could be got by ordinary means. The commissioners are not competent to judge, and this question of damages ought to be decided by a court of law or equity. The defendant with notice of the Company's act will not be permitted to do anything contrary to its provisions.

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If the case be referred to the tribunal proposed by the defendant, the injury is irremediable, as there is not any means of reviewing the verdict; but, if the defendant proceed to work, the Company will apply for an injunction, and the rights of the parties will be determined. The provisions of the act only determine the amount to be paid; they cannot determine the right of claim: *Wyrley Canal Company v. Bradley* (a), *Dudley Canal Company v. Grazebrook* (b), *Martin v. Porter* (c), *Morewood v. Wood* (d).

Mr. *Turner*, in reply, cited *Attorney-General v. Hotham* (e), *Barnard v. Wallis* (f).

THE MASTER OF THE ROLLS.—This case came on upon a motion to dissolve an injunction which was some time since granted to restrain the defendant from proceeding before a jury, summoned by the commissioners under the Barnsley Canal Act, to ascertain the compensation which the defendant might be entitled to for his interest in certain coal which the plaintiffs required to be left for the

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(a) 7 East, 368.

(b) 1 B. & Ad. 59.

(c) 5 M. & W. 351.

(d) 4 T. R. 157.

(e) 1 T. & R. 219.

(f) Antè, Vol. 2, 162.

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security of their canal. The canal had been long completed; it passes 495 yards through the estate of Mr. Beaumont, in the township of Barnley. The land over which it passed was purchased by the plaintiffs many years ago; but by the Canal Act the coal-mine and the coal were reserved to the owners, their heirs and assigns, who were to be at liberty to work the mine so as not to injure the canal; the plaintiffs were to be at liberty to inspect any working, and if the working should approach so near to the canal, as, in their opinion, to injure it, they might agree with the workers for the security of the canal, and as to the satisfaction which was to be paid for the same, and, if an agreement could not be come to as to the amount, the commissioners under the act were to summon a jury to assess and determine what satisfaction the owners or workers were to receive on being restrained from working the mine, and, upon payment or satisfaction being made according to the verdict, the owner or worker was to be perpetually restrained from working the mine. The owners or workers of the coal in this township do not appear to have had any information as to their liabilities, except that which might have been obtained from the Canal Act, which reserved to the owner the liberty of working the coal, not thereby injuring the canal. From the correspondence which has been proved in this cause, it seems that the plaintiffs did not think it incumbent upon them to point out what quantity of coal they required to be left for the safety of their canal, but rather desired the worker to go on at his own peril, and either to leave the coal, receiving no compensation for it, or to run the risk of doing an injury to the canal, for which he might be made answerable. If this was the intention of the plaintiffs, it was defeated by the proper attention which was given to the subject by the agent of Mr. Beaumont. Before any notice was given, and in the year 1830, Mr. Beaumont, the then owner of the coal in this place, agreed to let to F. B. and the defendant all the

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coal on the north and south sides of the canal, on one side up to the canal, and on the other side up to the canal and towing-path, on certain terms which gave to F. B. and the defendant an interest in the coal comprised in the lease, and that interest afterwards became vested in the defendant alone. In consequence of the state of the working in the year 1839, Mr. B.'s agent requested the plaintiffs to state what reservation of coal they desired to have for the safety of their canal. This request was often repeated by the agent, and in February, 1840, the defendant gave notice to the plaintiffs that he was willing to enter into an agreement with them for such coal as they required to be left for the security and preservation of their canal. Mr. Beaumont, it is admitted, was entitled to the coal under the canal and towing-path absolutely. He was not so entitled to the coal under the land on each side of the canal and towing-path, for, as to that, the defendant had under his lease or agreement a right to get it upon paying to Mr. Beaumont the due consideration. The plaintiffs, on the 9th of March, 1840, informed Mr. B.'s agent that they were advised to purchase from Mr. Beaumont the coal to the extent of eight yards in breadth on each side of the canal and towing-path. At this time the plaintiffs seem to have supposed that all the coal they required to be left for the safety of the canal had been reserved out of the defendant's lease. Upon this being explained by a letter from Mr. B.'s agent, dated on the same 9th of March, 1840, the plaintiffs afterwards, on the 11th of March, 1840, served the defendant with a notice not to work the coal within eight yards of either side of the canal and towing-path, and required him to state his claim (if he had any) to compensation. The defendant, in August, 1840, stated the sum of £551 as the amount of his claim to compensation, and the plaintiffs, knowing of this claim of the defendant, treated separately with Mr. Beaumont for a settlement of his claim, and, after a long delay,

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the interest of Mr. Beaumont in the coal under the canal and towing-path, and under eight yards on each side of them, was purchased and conveyed to the plaintiffs for the sum of £756. From the evidence produced on this occasion, I am of opinion that the sum of £756 did not include any compensation to which the defendant might be entitled in respect of his claim. It was not so intended by Mr. Beaumont or the person who acted for him, and there is nothing to shew that it was so understood by the plaintiffs or by Mr. F., who acted for them; on the contrary, it appears to me that the plaintiffs made their proposal to Mr. Beaumont with full knowledge that the claim of the defendant was outstanding and unaffected by the arrangement with Mr. Beaumont. The plaintiffs, though fully aware of the defendant's claim, made frequent attempts to postpone and evade the consideration of it, but at length the defendant succeeded in bringing the matter before the commissioners, under the act of Parliament, with the view of requiring the proper steps to be taken to ascertain the amount of the compensation due to him in the manner directed by the act of Parliament. The bill is filed upon an allegation, and praying a declaration that the defendant is not entitled to any compensation whatever, and thereupon praying that he may be restrained from proceeding to take any steps for the purpose of ascertaining the amount of such compensation. It was argued for the plaintiffs that the Court, which, under the act, is entrusted with the duty of ascertaining what satisfaction is to be paid to the coal worker, is not so constituted as to be likely to come to a just conclusion. But upon this point I entirely agree with the argument of the defendant, that no equity can be founded on an allegation that a Court legally constituted is not competent to decide questions which come properly within its jurisdiction. The Legislature has given its jurisdiction to the Court provided by the act, and has made its decision

final. If any inconvenience arise from the legal exercise of that jurisdiction, the Legislature alone can apply a remedy. It is next argued, that the plaintiffs had in fact paid the whole value of the coal to Mr. Beaumont, and nothing more could be required of them; having, as they say, paid to Mr. Beaumont the full value of the coal in the bed, they are under no obligation to give to the defendant any compensation for profit which he might have made by selling the coal which he intended to do under his lease or agreement; because the act of Parliament informs the defendant of the plaintiffs' right that he should not work so as to injure the canal. And it was further argued, that the Court to be constituted under the act of Parliament is only to try and determine the amount of compensation in cases where it is agreed, or in some way decided, that some compensation is to be paid, the Court having, as it is said, no jurisdiction to decide the question whether any or no compensation is to be paid. I conceive it to be clear that the plaintiffs are not entitled to an injunction, if the defendants are entitled to any compensation, the amount of which has to be ascertained. And I am of opinion that the defendant, under his lease, had an interest in the coal under the eight yards on each side of the canal and towing-path. He had a right to get the coal and to sell it for what he could get for it, paying the sum which became due to Mr. Beaumont. Upon his dealings there might have been a profit which he was prevented from making by the notice of the plaintiffs and the power given to them by the act of Parliament. The value of the coal in the bed or in the mine, paid to all coal owners, can be no compensation to the coal worker for the loss of the interest he has acquired. The ground on which it is argued he should have no compensation is, that when he took his lease he had notice, or was informed by the act of Parliament, that he was not to work the coal so as to injure

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the canal; but at the time he took his lease he had no notice that the plaintiffs would require eight yards of coal to be left for the safety of their canal on each side of the canal and towing-path. The coal under the canal and towing-path was not comprised in his lease, and he had no interest in it, but he did not know that the plaintiffs would require more or less than eight yards in breadth of coal on each side of the canal and towing-path. He knew he was not, by the working of the coal, to injure the canal, and it does not appear that he did so. He also knew that the plaintiffs were entitled to inspect the working; that if he worked contrary to the act he was entitled to make good any repairs rendered necessary by his improper working. But as the plaintiffs did not think fit for so many years to give any notice as to the quantity of coal which they required to be left for the safety of the canal, it does not appear why the defendant should not enter into any agreement for working and getting all the coal under his lease. I think it very probable that the power given by this act might have been exercised so as to enable the plaintiffs to buy the coal under the canal and towing-path, at a reasonable distance on each side of them, at the value of the coal in the bed; but, for reasons of their own, they probably desired to delay the notice as long as they could. They left it quite uncertain whether they would or would not require any coal to be left for the safety of the canal, and I think they cannot justly complain of any rights the coal owner might have given to the coal worker during the time they delayed for their own convenience. Under these circumstances, I am of opinion the defendant lawfully acquired an interest in the coal, which the plaintiffs desired to be left for the safety of the canal. I do not consider what may be the value of the interest or what may be the proper mode of computing it. I am of opinion the defendant has an interest in respect of

which he is entitled to receive satisfaction, and that the amount of satisfaction which he is to receive is to be assessed and determined in the manner directed by the act.

From this decision the plaintiffs appealed.

Mr. *Tinney* and Mr. *Daniell*, for the appellants.

Mr. *Wakefield* and Mr. *Glasse*, for the respondents.

In the course of the argument the following cases were cited :—*Reg. v. The Committeemen for the South Holland Drainage* (a), *Reg. v. Trustees of Swansea Harbour* (b), *The Skinners' Company v. The Irish Society* (c), *Gordon v. The Cheltenham and Great Western Railway Company* (d), *Dudley Canal Navigation Company v. Grazebrook* (e), *Dun Navigation Company v. North Midland Railway Company* (f), *Kemp v. The London and Brighton Railway Company* (g), *Martin v. Porter* (h), and *Wilde v. Holt* (i).

The LORD CHANCELLOR observed, that the sections of the act which applied to the working of mines under the canal and towing-path, did not reach this case, as the defendant's mine, which was the subject of this suit, was under the land within eight feet of the towing-path; that if Mr. B. were himself the worker of the mine, he would be entitled to compensation for the loss he sustained by not working, that is, to the value of the coal when gotten, deducting the expense of getting it out. And if he parted with a portion of his interest, viz. so far as regarded the profit to be derived from working, to Twibill, then Twibill would be equally entitled to compensation. If he considered

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(a) 8 A. & E. 429.

(b) 8 A. & E. 439; 1 P. & D.
512.

(c) 1 My. & Cr. 162.

(d) Antè, Vol. 2, pp. 800, 872.

(e) 1 B. & Ad. 59.

(f) Antè, Vol. 1, 135.

(g) Antè, Vol. 1, 495.

(h) 5 M. & W. 351.

(i) 9 M. & W. 672.

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that there was a question of reasonable doubt, he would send a case for the decision of a Court of law, but he thought from the first that the language of the act was clear, and after listening to the very able argument of Mr. *Tinney* and Mr. *Daniell*, he still thought it could only admit of one construction. The Master of the Rolls granted the injunction originally, but he gave judgment, after deliberation, in favour of the defendant, and his Lordship concurred in that judgment, and was of opinion that the motion must be dismissed with costs.

BEFORE THE LORD CHANCELLOR.

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 28th June.
 1844.
 6th Nov.

SHEFFIELD CANAL COMPANY v. SHEFFIELD AND ROTHER-
 HAM RAILWAY COMPANY (a).

The discovery, after decree, of material evidence which had existed before the commencement of

the suit, affords sufficient ground for a supplemental bill in the nature of a bill of review; but such bill cannot be filed without the leave of the Court, and the Court, before granting such leave, will require to be satisfied that there has been no want of attention or diligence on the part of the applicants.

Two of the original directors of the S. Railway Company, were also proprietors of shares in, and one of them was also on the committee of management of the S. Canal Company, during the progress of a suit instituted by the S. Canal Company against the Railway Company, for the specific performance of an agreement.

Prior to the institution of the suit, a meeting of the directors of the railway had taken place, and a report and resolutions touching the matters in dispute passed.

On the production of the Company's books no entry of the report or resolutions appeared in the open parts of the books, and the sealed parts thereof were sworn not to contain anything material to the plaintiffs.

The Railway Company were bound by the provisions of their act to enter all reports and proceedings in their books.

Upon a motion for leave to file a supplemental bill in the nature of a bill of review, supported by an affidavit of the clerk of the Canal Company, to the effect that he did not know of the report and resolutions, and that he believed that the former clerk and the committee of the Canal Company were ignorant of them, leave to file such bill was granted. Costs reserved.

(a) See p. 121, *antè*.

covered new and material evidence in support of their case.

This motion was supported by an affidavit of W. Wake, who had succeeded his father B. J. W. as law clerk to the Canal Company, and was to the effect that, in August 1840, he had proceeded to open the books admitted by the Railway Company to be in their possession, when he found parts thereof sealed up, and that he had carefully inspected and read, and taken copies of, all such portions of the said books as were visible. And that since the 4th of December, 1841, when the decree was pronounced, and from information which, for the first time, came to his knowledge on the 29th of April, 1842, he believed the fact to be that the books sealed up contained entries relating to the Company of proprietors of the Sheffield Canal, and the matters in question in the cause, other than those contained in the portions of the books which were visible, and which the plaintiffs were entitled to have had the benefit of, both prior to and at the hearing of the cause. And that since the pronouncing of the decree, he had good reason to believe that a public meeting of the proprietors of the said Railway Company had been held in the month of August, 1836, and that at such meeting a report had been read, and resolutions proposed, which had been unanimously adopted and passed; and that in the report and resolutions so adopted and passed at the said meeting, were contained matters relating to the Company of proprietors of the Sheffield Canal, and the matters in question in this cause. And that by the act incorporating the said railway (a), it was among other things enacted, that the directors should, if required, from time to time, make reports of their proceedings to the Railway Company at their general meetings, and should obey their orders and directions, and should regularly enter in some book to be provided at the

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(a) 6th & 7th Will. 4, c. cix, s. 99.

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expense of the said Company for that purpose, notes, minutes, or copies (as the case should require) of every such appointment, contract, receipt, and disbursement, and of all other their orders and proceedings, which book should be deposited with, and kept under the care and direction of the said directors. And also (a) that the orders and proceedings of every meeting (as well general as special) of the said Company and of the said directors, should be entered in some book to be provided and kept for that purpose, and should be signed by the chairman of each respective meeting; and such orders and proceedings, when so entered and signed, should be deemed original orders and proceedings, and should be allowed to be read in evidence (a) in all courts, and before all judges, justices, and others. That the report and resolutions of August, 1838, were, or ought to have been, entered in the defendant's books. That, if entered in any of the books, they were sealed up. That the fact of the books containing these entries was unknown to the deponent until about the 29th of April, 1842, when the deponent received a letter from W. B., clerk to the deponent, purporting to be the report of the directors of the Sheffield and Rotherham Railway Company, which contained the following statement:—"It will be recollected that in the bill of last year, a clause was inserted requiring the Company to pay to the Sheffield Canal Company £100 a-year, for ever, towards the repairs of the Wicker, lying between the railway and Lady's Bridge, in Sheffield. The Commons this year refused to admit the clause into the bill, and it was attempted to be thrust upon us in the Lords. The Lords also declined to admit it, as it was a money clause, and would have occasioned the loss of the bill in the Commons; but they recommended us to come to some arrangement on the subject of a compensation for the extra traffic which the railway would bring

(a) S. 100.

upon the Wicker, mentioning neither the amount nor the conditions. We therefore, after the Lords' Committee had passed the bill, offered to enter into an agreement to pay to the Canal Company £100 a-year, by half-yearly payments, the first to be made six months after the opening of the railway, to be applied exclusively towards the repair of 'The Wicker,' and the payment to cease altogether, if Parliament should ever relieve the Canal Company from their liability to repair the road from Tinsley to Lady's Bridge, or should authorize a toll to be taken upon it: the Canal Company contended that the payment should be for ever, and unconditionally; we, however, refused to abandon the conditions; they consequently threatened to oppose the bringing up of the report and the second reading, but they ultimately deemed it wise to accept our proposition. This will need carrying into effect by a formal document, the arrangement resting at present merely upon certain correspondence between our solicitors and the law clerk of the Canal Company." That the said report was not entered in any part of the books which was left open, and that he believed that that report was contained in some part of the books, and that the defendants had the draft and copies of the said report and resolutions. And the affidavit further stated, that until the receipt of the said printed paper, the deponent was entirely ignorant of the said report and resolutions of the said meeting. And the deponent, to the best of his knowledge, information, and belief, denied that the committee or directors of the said plaintiffs had any notice, knowledge, or information of the said report and resolutions, or that the sealed up part of the books contained any notice, copy, or entry thereof, until after the 29th of April, 1842.

The affidavits filed on behalf of the defendants, stated that J. M. and J. S. were proprietors of the Canal Company and also two of the first directors of the Railway

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Company, and were both present when the report and resolutions of the 9th of August, 1836, were agreed to and passed, and that printed copies of such report and resolutions were sent to all the shareholders, and to the said J. M. and J. S. That the said report and resolutions were published in the *Iris* newspaper, at full length. That Hugh Parker, Esq., was the chairman of the Canal Company, and was a subscriber to the newspaper. That B. J. Wake had in his possession, and saw and read, the *Iris* newspaper of the 16th of August, 1836, which contained the said report and resolutions, and which contained some observations and remarks written and addressed to B. J. Wake by the deponent, the editor, and that, in the course of a few days after the date and publication of the said newspaper, deponent received a note in answer to such observations. That the report and resolutions were not, and had never been dealt with as private documents. That T. Badger (the solicitor of the Railway Company), a few days after the 8th of December, 1838, called on B. J. Wake, and had then a conversation with him in reference to the proposed agreement, and also to the report of the 9th of August, 1836. That he mentioned this conversation to his partner.

The affidavits of the plaintiffs, in answer, stated, that no minute or entry of any such conversation was made in the books of B. J. Wake, deceased. That it did not appear from the books that B. J. Wake was ever aware of such report. That the bill of costs contained no mention of any attendance by T. Badger or his partner on B. J. Wake in the month of December, 1838, or January, 1839.

Mr. *Wakefield* and Mr. *Parker*, in support of the motion.—It is not enough that there should be the opportunity of acquiring knowledge by means of a newspaper or conversations, of any document important to the cause, but the

notice must be positive. Notice to a solicitor in one transaction is no notice in another. The matter is material, and was not known previously to the decree pronounced in the cause.

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Mr. Bethell and *Mr. Bacon*, contra.—Such an application as this for a bill of review is never entertained by the Court, unless the parties are in a condition to shew, and to prove, that the matter sought to be introduced is new, and that the persons applying for the permission could not, with reasonable diligence, have come to the knowledge of the facts. Such an application cannot be founded on forgetfulness. When the matter is as notorious as this it cannot be called “*res noviter inventa*.” Notice by the newspaper has always been considered as sufficient.

Mr. Wakefield, in reply, cited *Lord Portsmouth v. Lord Effingham* (a), *Wilson v. Webb* (b).

THE LORD CHANCELLOR.—This is a motion for leave to file a supplemental bill in the nature of a bill of review. The principal question in the cause was, whether the proposal made by Messrs. Badger and Vickers, on the part of the Railway Company, in their letter of the 28th of June, 1836, was absolutely rejected by B. J. Wake, the solicitor of the Canal Company, at the meeting which took place on the same day, and the treaty thereby closed, or whether it was left open in order that B. J. W. might consult Lord W. before he decided whether he would accede to or reject it. On the evidence on the hearing of the cause, the Master of the Rolls was of opinion, that, at the meeting, the proposal was definitively rejected and the treaty closed, and, as a necessary consequence, the plaintiffs’ solicitor could not afterwards, by declaring his acceptance of the offer which

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(a) 1 Ves. 430.

(b) 2 Cox, 3.

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he had previously rejected, fasten an agreement on the defendants. It is stated in support of the present motion, that, since the decree was pronounced, the plaintiffs have discovered new and material evidence in support of their case, which, if produced at the hearing, would have led to a different result, and entitled them to a decree in their favour. This evidence consists of a report of the directors of the Railway Company made at a general meeting of the proprietors, and of certain resolutions passed at that meeting by which the report was adopted. As the question, in a great measure, depended on the statement of what passed at the meeting of the 26th of June, 1836, the subsequent representation of the transaction by the defendants themselves was undoubtedly very material. In the report, they state the proposal which was made, the counter-proposition of the plaintiffs—the rejection of that proposition—a threat on the part of the plaintiffs to oppose the bringing up of the report, and their final acceptance of the proposal made by the defendants. It is not suggested that the treaty had been broken off, or that the acceptance came too late; on the contrary, they speak of the matter as an arrangement, that is, as something settled, something agreed upon, though resting, as they represent it, on the correspondence between the solicitors. They state that it would be necessary to carry it into effect by a formal document, which imports, I think, that the matter was settled, though informally. It is impossible to doubt that this evidence would have been very important to the hearing of the cause; whether taken in connexion with the rest of the proofs, it would necessarily have led to a different result, I will not undertake, on this motion, to decide; it is sufficient to say that the introduction of it would raise a question of considerable nicety for the consideration of the Court, and would be a sufficient ground for allowing the supplemental bill in the nature of a bill of review to be filed, provided the Court were satisfied that the evidence had been

discovered since the decree, and that there had been no want of attention or diligence on the part of the plaintiffs or their agents. It is necessary, therefore, to inquire whether the plaintiffs or their solicitor knew of the report and resolutions before the decree, and whether the omission to avail themselves of this evidence is imputable to their own inattention and neglect; for if so, they are not, according to the usual rule, entitled to the relief they seek. It appears that some of the members of the Canal Company were proprietors of shares in the railway, and were present when the report was read and the resolutions passed. This applies, amongst others, to Marsh and Spencer, both of whom were among the original directors of the railway by whom the report was drawn up and presented, and were also proprietors of shares in the Canal Company; they therefore must have known of the report and resolutions, and Marsh was on the committee of management of the Canal Company in 1840, while the suit was proceeding. Several of the persons who were themselves members of the committee of management in 1839 and the following years, denied all knowledge of the report and resolutions till after the judgment was delivered. No affidavit has been made by Mr. Hugh Parker, who appears to have continued a member of the committee for several years, and in 1836 was chairman. The reason assigned, viz., that he had removed to the neighbourhood of Derby, is not very satisfactory. Mr. Marsh, also, who is stated to have been one of the committee of management in 1840, while the suit was in progress, does not join in the affidavit; he could not have done so, as he was one of the directors of the Railway Company by whom the report was presented. The deponents say, not only that they themselves were not aware, but that they believe that none of the proprietors were aware of the existence of the report or resolutions till after the judgment. This would include Mr. Marsh, and can only be explained on the supposition that they were

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not apprised of his having been a director of the Railway Company in 1836, and his having concurred in the presentation of the report. The report and resolutions were printed in each of the three newspapers published in Sheffield; some of the canal proprietors were subscribers to one of those papers, the "Iris," and several were in the habit of attending the news rooms in which all the Sheffield newspapers were regularly taken in. It appears, also, that the report and resolutions were printed and circulated, and copies sent by post to each of the proprietors, several of whom, as I have already said, were also proprietors of the canal shares; it seems very improbable, therefore, that none of the proprietors should have known at the time of what passed at the general meeting of August, 1836, as represented in the affidavits filed on the part of the plaintiffs; but as the passage in question forms only a small and subordinate part of the report relating to a collateral matter, it is not unreasonable to suppose that it may have escaped their recollection after so considerable an interval of time. With regard to Mr. B. J. W., the solicitor of the Canal Company, it is proved that he saw the copy of the "Iris" in which the report and resolutions were published, and in a conversation with Mr. B., the solicitor of the Railway Company, before the suit was commenced, he is said to have referred to those documents, and to have insisted that the statements in them were incorrect. This is sworn by Mr. B. in his affidavit, and is confirmed to a certain extent by Mr. V., who says, that, immediately after the conversation, Mr. B. told him what had passed between him and Mr. Wake. Mr. Wake being dead, this statement does not admit of direct contradiction. But affidavits have been filed by Mr. W. Wake and his brother, referring to the books of the deceased, which are represented to have been kept with considerable minuteness of detail, and in which no entry is to be found of any meeting with Mr. B. at the time this conversation is stated to have been held, and they

say that such entry would, according to the usual course, have appeared, if the meeting had really taken place. It is also sworn, that they themselves knew nothing of the report and resolutions, and that they are convinced, from his whole conduct, and from all that passed between them and Mr. B. J. Wake on the subject of this cause, that he had no knowledge of them. From the contents and effect of the report and resolutions, it is reasonable to infer that they were not present to the mind of Mr. B. J. W. either when the bill was filed or in the progress of the cause, for it would be difficult in any other way to account for his not having made them a part of his case. The omission is the more remarkable as he had referred in the bill to a report presented to the Canal Company, in which the agreement is stated, and had relied upon Mr. B.'s acquiescence in the correctness of that statement. These documents were material for the same purpose, and lead with much greater effect and more directly to the same conclusion. But, after considering these circumstances, I think, though with some hesitation, that in the absence of any evidence to impeach the character of Mr. B., (and nothing of this sort is even suggested), I ought not to allow the inference to be drawn from this evidence to outweigh the direct and positive testimony in his affidavit, confirmed as it is by the statement of his partner Mr. V. The manner in which, after the death of Mr. B. J. Wake, this evidence is said to have been discovered, is not a little singular:—some person, it is stated, left the copy of the circular at the residence of Mr. Wake, in Sheffield, when that gentleman was in London; we are not told who this person was, nor is it stated that Mr. Wake does not know and cannot inform us. This is very unsatisfactory; if he really do not know, he ought to have stated this in his affidavit as a reason for not offering the testimony of this person with respect to the circumstances connected with the finding and production of the document. This view of the evidence would, on the

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whole, have led me to the conclusion, according to the usual practice of the Court, that the present motion ought not to be granted. But there is a circumstance in this case which, during the whole discussion, has pressed strongly on my mind—it was the duty of the defendants, a public duty prescribed by the act of Parliament, to have entered the report and resolutions in the books of the Company. Had they performed their duty in this respect, (for I must, on the affidavit of B. and V., assume that no entry has been made), the plaintiffs would have had the benefit of these documents, and the consequence of any want of care and attention on the part of themselves or their solicitor might thus have been obviated. No reason has been assigned nor any excuse offered for this omission. I think, therefore, under these circumstances, that I shall exercise a sound and just discretion in allowing the supplemental bill to be filed: *Wilson v. Webb* (a).

On an application by Mr. *Bethell*, with regard to the costs of the application,

The LORD CHANCELLOR said, I have considered that question, and I wish that question of costs to remain till after the decision of the cause. I wish it very much to depend on the result of those parts of the book which were sealed up. I assume that those parts of the book do not contain the resolutions. The circumstances are singular, and I will not dispose of the question of costs till that fact is ascertained.

(a) 2 Cox, 3.

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BEFORE V. C. KNIGHT BRUCE.

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THIS suit was instituted for the purpose of procuring a conveyance of a piece of land taken by the Midland Counties Railway Company, and for a declaration of the rights of the parties, so as to enable the Company to pay over the purchase-money, on which, until such payment, they were bound to pay interest at £5 per cent.

The bill stated the material sections of the act (6 & 7 Will. iv, c. lxxviii (a)), whereby the Midland Counties Rail-

A Railway Company, under the provisions of their act, were empowered to take lands, and it was made lawful for "all corporations, &c., and for all other persons whomsoever, to contract for sale of,

and convey the same to the Company." The Company gave notice of their intention to treat, to A., who was at that time, and continued until his death, in an imbecile state of mind. Previously to becoming imbecile, A. had made a will whereby he gave and bequeathed "all my money, goods, chattels, estates, and effects of what nature or kind soever and wheresoever the same may be found," to his wife for life, and after her decease to his children equally. A. died before the purchase-money for the piece of land taken by the Company, which had been assessed by a jury, had been paid.

Held, that, the Railway Company could not pay over the purchase-money or procure a conveyance, except under the direction of a court of equity.

That under the devise the real estate of the testator passed.

That the land was not converted by the proceedings under the Railway Act, and that the purchase-money belonged to the devisees of the land.

That A. (some of the necessary parties to a conveyance being infants) was a vendor within the meaning of the 1 Will. 4, c. 60, s. 16.

(a) Sect. 11. [Empowering the Company to enter into and upon the lands of any person or corporation whatever.]

Sect. 13. [Empowering the Company to treat and agree for the purchase of lands.]

Sect. 14. "That after any lands intended to be taken or used for the purposes of this act, shall have been set out and ascertained by the said Company, it shall be lawful for all corporations, tenants in tail

or for life, or for any other partial or qualified estate or interest, husbands, guardians, trustees, and feoffees in trust for charitable or other purposes, committees, executors, administrators, and all trustees and persons whomsoever, not only for and on behalf of themselves, their heirs and successors, but also for and on behalf of all persons entitled in reversion, remainder, or expectancy after them, if incapacitated or not to be found; and for

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way Company were incorporated and empowered to make their railway.

and on behalf of their wives, wards, lunatics, and idiots respectively, and in the same manner and to the same extent as such wives &c. respectively could have done by law, under the powers of this act, if sole, of full age, and of sound mind; and for and on behalf of their cestui que trusts, when infants, issue unborn, lunatics, idiots, femmes covertes, or other persons; and to and for all femmes covertes seised, possessed of, or interested in their own right, or entitled to dower or other interest; and for all other persons whomsoever seised or possessed of, or interested in, any such lands, to contract for, sell, and convey the same, or any part thereof, unto the said Company [here follows a form of conveyance]. And all such conveyances and agreements to surrender as aforesaid shall be valid and effectual in the law to all intents and purposes, and shall operate to merge all terms of years &c., and to bar and destroy all estates tail and other estates, rights, titles, remainders, reversions, limitations, trusts, and interests whatsoever of and in the same."

Sect. 31. "And for settling all differences which may arise between the said Company and the several owners and occupiers of, or persons interested in any lands which shall or may be taken, used, damaged, or injuriously affected by the execution of any of the powers hereby granted, be it further enacted, that if any corporation, trustee, or other person so interested or entitled and capacitated to sell, agree, convey,

or release as aforesaid, shall not agree with the said Company as to the amount of such purchase-money, satisfaction, recompense, or other compensation as aforesaid; or if any of the parties entitled to receive such purchase-money, &c., shall refuse to accept such purchase-money, &c., as shall be offered by the said Company, and shall give notice thereof in writing to the said Company within twenty-one days next after such offer shall have been made, and the party giving such notice shall therein request that the matter in dispute may be submitted to the determination of a jury; or if any of such parties as aforesaid shall, for the space of twenty-one days next after notice in writing shall have been given to the clerk, agent, or principal officer of any such corporation, or to any of such trustees or persons respectively, or left at his last or usual place of abode, or with the tenant or occupier of any lands required for the purposes of this act, neglect or refuse to treat, or shall not agree with the said Company, for the sale, conveyance, or release of their respective estates or interests, or the respective estates or interests which they respectively are hereby capacitated to convey therein, or shall, by reason of absence, be prevented from treating, or shall, by reason of any impediment or disability, (whether provided for by this act or not), be incapable of making such agreement, conveyance, or release as shall be necessary or expedient for enabling the

That the Company were by their act authorized to take, for the purposes of their railway, a piece of land in the

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said Company to take such lands, or to proceed in making the said railway, &c., or shall not disclose or prove the state of the title to the premises of which they may be respectively in possession, or of the share, interest, or charge which they may claim to be entitled unto or interested in, in case they shall be required to do so by the said Company, or in any other case where agreement for compensation for damages incurred in the execution of this act, or for the purchase of lands, cannot be made, then and in every such case the said Company shall, and they are hereby required, from time to time, to issue a warrant, either under their common seal, or under the seal of three at least of the directors of the said Company to the sheriff of the county in which the lands in question shall be situate, or the matter in dispute shall arise; or in case such sheriff or under-sheriff shall be one of the said Company, or enjoy an office of trust or profit, or shall be in any way interested in the matter in question, then to any of the coroners, &c., commanding such sheriff, &c., to [summon a jury and witnesses in manner therein mentioned], and such jury shall 'inquire of, and assess, and give a verdict for the sum of money to be paid for the purchase of such lands, and also the sum of money to be paid by way of compensation for damages' [as therein mentioned], 'which said verdict, and the judgment to be pronounced there-

on as aforesaid, shall be binding and conclusive to all intents and purposes upon all corporations and persons whatsoever.'"

Sect. 39. "That, upon payment or legal tender of such sum of money as shall have been contracted or agreed for between the parties, or assessed by any jury in manner aforesaid, for the purchase of any lands, &c., to the proprietors of such lands, or other persons respectively interested therein, and entitled to receive such money or compensation respectively, or if the persons so respectively entitled or interested as aforesaid, or any of them, cannot be found, or shall be absent from England, or shall refuse to receive such money as aforesaid, or shall refuse, neglect, or be unable to make a good title to such lands to the satisfaction of the said Company, or if any party entitled unto, or to convey such lands, shall not be known, or shall be absent from England, or shall refuse, neglect, or be unable to convey the same, then, upon payment of the said money into the Bank of England, as herein-after directed and required, for the use of the persons respectively entitled thereto, or in case such money shall have been agreed or awarded to be paid for the purchase of any such lands, or such recompense as aforesaid, which any corporation, trustee, or person under disability, is hereby capacitated to convey, upon payment of such money into the Bank

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parish of Barrow-upon-Soar, in the county of Leicester, of which Thomas Oswin, who, at the time of giving the notices, and thenceforth until his death, was in an imbecile state of mind and incapable of transacting business, was seised in fee.

That, on the 24th December, 1838, a notice in the form prescribed by the act was addressed to the said T. O. to the effect that the piece of land would be wanted by the Company, and that it was their intention to treat for the purchase thereof.

That, by reason of the aforesaid disability, T. O. was incapable of making such agreement or conveyance as was necessary to enable the Company to take the said piece of land, and did not treat or agree with the Company for the sale and conveyance thereof.

The Company, in pursuance of their act, (the sheriff being a member of the said Company), issued a warrant to one of the coroners of the said county of Leicester, and

as hereinafter directed, it shall be lawful for the said Company and their agents, &c., immediately to enter upon such lands; and thereupon such lands and the fee-simple and inheritance thereof, and all the estate, use, trust, and interest of all parties therein, shall thenceforth be vested in and become the sole property of the said Company, to and for the purposes of this act."

Sect. 44. "That if any money shall be agreed or awarded to be paid for the purchase of any lands, to be taken or used by virtue of the powers of this act, or of any interest therein, and which any corporation, trustee, or feoffee in trust, or any person whosoever, having no power to convey the premises in respect of which the same may be

payable, shall be entitled unto, or interested in, such money shall, in case the same shall amount to or exceed the sum of £200, be paid into the Bank of England [pursuant to act 1 Geo. 4, c. 35]; and shall, when so paid in, there remain until the same shall by order of the said Court, made in a summary way upon petition to be presented to the said Court by the party who would have been entitled to the rents and profits of the said lands, be applied either in the purchase or redemption of the land-tax or in or towards the discharge of any debt or other incumbrance affecting the said lands, &c., or until the same shall upon the like application be laid out by the order of the said Court in the purchase of other lands, &c."

on the 1st of April, 1839, a notice was addressed to T. O. that a jury was to be impannelled to inquire into the sum of money to be paid for the purchase of the said piece of land, and for compensation for damage.

That an inquisition was duly taken on the 9th day of April, 1839, and, by the record of such inquisition, it appeared that the jury found that £300 was the sum to be paid for the purchase of the said land, and £140 by way of compensation for loss and inconvenience.

That the said T. O., when he was of sound mind, duly made his will, dated the 29th of September, 1836, which was in the following words:—"I give and bequeath to my loving wife, Mary O., all my money, goods, chattels, estate, and effects, of what nature or kind soever, and where-soever the same may be found at the time of my decease, for the natural term of her the said Mary O.'s life, and at the decease of my said wife all my property of goods, money, chattels, estate, or effects whatsoever, to be equally divided between all my children living at the time of her decease; and, lastly, I nominate my said wife, M. O., sole executrix of this my last will and testament."

That the said T. O. died in October, 1839, without having revoked or altered his will, which was proved by the said M. O., and leaving him surviving his widow and two infant children, viz. the defendants, Ann O., and Thomas O., his heir-at-law. That the Company had taken and were then in possession of the piece of land, and were desirous of paying the said sums of £300 and £140. And the bill charged, that, at the death of the said T. O., the piece of land taken by the company, with other hereditaments of the said testator, was subject to a certain mortgage term of 1,000 years, for securing £230; and it prayed a declaration, that, on payment by the Company of the sum of £440 to the parties entitled to receive the same, the Company were entitled to have the said piece of land conveyed to them, and also an account of

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what was then due by the Company in respect of the said £440 and interest, and that the Company might be at liberty to pay to the mortgagees the amount then due to them, and obtain an assignment to them of the said piece of land for the residue of the mortgage term, and that such payments might be allowed to the Company as a part payment on account of the said £440 and interest, and praying also a declaration of the rights of the parties and a conveyance of the land to the Company under the 1st Wm. 4, c. 60 (a).

The *Vice-Chancellor*, at the hearing of the cause, refused to make any decree as to the payment of the purchase-money, so as to relieve the company from the payment of the interest, but declared the purchase-money due with interest from August, 1840, the defendant, Mary Oswin, admitting that no more was due. He directed an inquiry as to mortgages, and that if any sum should be found due, the plaintiffs should be at liberty to pay it, and be allowed the sum; and he reserved further directions and costs, with liberty to apply.

(a) Sect. 16. "That where any land shall have been contracted to be sold, and the vendor, or any of the vendors, shall have departed this life, either having received the purchase-money for the same or some part thereof, or not having received any part thereof, and a specific performance of such contract, either wholly or as far as the same remains to be executed, or as far as the same, by reason of the infancy, can be executed, shall have been decreed by the Court of Chancery in the lifetime of such vendor or after his decease, and where one person shall have pur-

chased an estate in the name of another, but the nominal purchaser shall, on the face of the conveyance, appear to be the real purchaser, and there shall be no declaration of trust from him, and a decree of the said Court, either before or after the death of such nominal purchaser, shall have declared such nominal purchaser to be a trustee for the real purchaser, then and in every such case the heir of such vendor, or such nominal purchaser, or his heir, in whom the premises shall be vested, shall be deemed to be a trustee for the purchaser within the meaning of this act."

The cause now came on on further directions.

Mr. *James Parker*, for the Railway Company.

Mr. *Glasse*, for the defendant, Mary Oswin, contended that the real estate was well devised by the will, and that the word "Estates," though associated with words exclusively applicable to personalty, was sufficient to pass the real estates. *Huxtep v. Brooman* (a), *Bebb v. Penoyre* (b), *Doe d. Morgan v. Morgan* (c), *Thomas v. Phelps* (d), *Doe d. Evans v. Evans* (e), *Saumarez v. Saumarez* (f), *Davenport v. Coltman* (g).

He also contended that a conversion had been effected by the operation of the act, and that the purchase-money had thereby become personalty. *Salmon v. Randall* (h).

Mr. *Wray*, for Thomas Oswin, the heir-at-law.—The testator intended only by his will to give his personal estate, and we must give to the word "estates," mixed up, as it is, with words applicable to personalty only, the meaning which the testator may be presumed to have intended should be given to it. The testator had only one estate, and, therefore, that word used in the plural cannot apply to the land in question so as to disinherit the heir, in favour of whom the general rule of interpretation leans. *Wilkinson v. Merryland* (i), *Timewell v. Perkins* (k), *Doe d. Bunny v. Rout* (l), *Henderson v. Farbridge* (m).

In the course of the argument his Honour referred to *Roe d. Helling v. Yeud* (n).

(a) 1 Bro. C. C. 437.

(b) 11 East, 160.

(c) 6 B. & C. 512.

(d) 4 Russ. 348.

(e) 9 A. & E. 719.

(f) 4 My. & Cr. 331.

(g) 11 Law J., N. S., Ch. 262.

(h) 3 Myl. & Cr. 439.

(i) Cro. Car. 447, 449.

(k) 2 Atk. 102.

(l) 7 Taunt. 79.

(m) 1 Russ. 479.

(n) 2 New Rep. 214.

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The VICE-CHANCELLOR.—It lies, in the first instance, upon those who say that the real estate has not descended to shew that it has not so descended ; but when they produce a will properly executed and attested, purporting to give all the testator's " money, goods, chattels, estates, and effects," the burthen is shifted, and it lies upon those who say that the real estate is not included in that will to shew that it is not included. I apprehend that in this case the burthen is shifted, and that it is for the heir-at-law to shew that the proper construction of the will is the limited construction of the general words. I have always considered that the rule in these cases could not be better expressed than it is by Lord *Eldon* in *Church v. Mundy* (a), where he says, " I am strongly influenced towards the opinion that a court of justice is not by conjecture to take out of the effect of general words property which those words are always considered as comprehending ;" and a little lower down, " the best rule of construction is that which takes the words to comprehend a subject which falls within their usual sense, unless there is something like declaration plain to the contrary ; and surely that is the safest course where, as there is no other subject to which they can be applied, the testator must, if he does not mean that, be considered as having no meaning." Now, in the present case, all the words are general expressions. The word " money" is the only word as to which the propriety of that description might be doubtful ; but even that word, in its common use by mankind, is more a general than a specific expression. The next consideration is, that, unless the realty be included under the words " estate" and " estates," these words are mere superfluities, for the words " goods, chattels, and effects," would of themselves carry the personalty ; to these considerations, is added the circumstance, that this is the will of an unlettered man ; and I think I should act

(a) 15 Ves. 406.

against the soundest rules of construction, if I were to hold that the general words "estate" and "estates" were limited by the other words. I must, therefore, hold that the real estate passes by the will.

The minutes of the decree were as follows :—

Declare that, according to the true construction of the testator's will, the real estate of which he was seised at the time of the date and execution of his will, and at the time of his death, passed under it, if the same was executed and attested as by law was then required for the devise of freehold estates. And declare the wife and children trustees for the Company of the real estate, but without prejudice to any question between the son, the mother, and sister, as to the execution and attestation of the will.

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Mr. Glasse, with the consent of all parties, and in order to save the expense of a petition, submitted, that, under the circumstances of the case, the property must be considered as having been converted into personalty from the moment of the delivery of the verdict of the jury. He referred to the 44th section of the act; he also cited *Ex parte Hawkins* (a) and *Salmon v. Randall* (b).

The VICE-CHANCELLOR.—My present impression is, that upon a reasonable construction of the whole act, though there are no words precisely and clearly applicable to the case, it was not intended to change the nature or quality in point of devolution of any man's property, who was incapable of consenting. Consequently, in the case of a

(a) This case was decided in Michaelmas Term, 1843, and was as follows :—Henry Hawkins contracted to sell certain freehold property to the corporation of London under the "London Bridge Improvement Act," but died before any conveyance was executed. The Company took possession, and after

Mr. H.'s death paid the purchase-money into the bank. The question was, whether the money belonged to the real or personal representative of Hawkins, and the Vice-Chancellor of England held that it went to the latter.

(b) 3 My. & Cr. 439.

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lunatic, if his property could be effectually taken from him, it could not be so taken from him as to change the course of devolution. No one disputed the proceedings during Thomas Oswin's life, and I think that I may take the property as bound by those proceedings, but not so as to change its nature and quality.

BEFORE THE V. C. OF ENGLAND.

DAVIS v. COMBERMERE.

Re THE SOUTH EASTERN RAILWAY COMPANY.

Feb. 1844.

Tenant for life of estates, the subject of a suit, having been served with notice by a Railway Company of their intention to apply for an act to carry their railway through these estates, applied by petition for a reference to the Master to inquire what proceedings should be taken, and whether it would be fit to make any and what arrangements, and that the petitioner might be at liberty to take such proceedings, and enter into such arrangements. The order was made as prayed, with liberty to the petitioners to proceed with evidence on the Master making his report.

THIS petition was presented by F. S. Greville, tenant for life of certain estates devised by a will, in respect of which bills had been filed in Chancery, in consequence of a notice served by the South Eastern Railway Company on the petitioner of their intention to apply to Parliament for an act to enable them to carry their railway through part of these estates let to A. B. And it prayed a reference to the Master to inquire whether it would be proper that any proceedings should be taken by the petitioner on behalf of himself and the persons interested in remainder in the estates, in Parliament or otherwise, with reference to the proposed bill for forming the railway, and from time to time to inquire whether it would be fit and proper to make any, and what arrangements with the parties prosecuting the bill, and that petitioner might be at liberty from time to time to take such proceedings and make such arrangements as the said Master should direct.

Mr. Toller, for petitioner.

Ordered, as prayed, with liberty to take proceedings, &c., immediately on Master making his report.

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Feb. 28th.

THE bill, filed the 12th July, 1838, stated the act incorporating the London and Greenwich Railway Company, (3 W. 4, c. xlvi), whereby it was, among other things, enacted, that the said Company should have power and authority to purchase and to hold lands, tenements, and hereditaments, to them and their successors and assigns, for the use of the said undertaking, without incurring any of the penalties or forfeitures of the statutes of mortmain, and should also have power to sell and dispose of the said lands, &c., again in manner by the said act directed, and that if certain persons therein named should be applied to by or on behalf of the Company to sell, for the purposes of the said act, any part of any property then respectively belonging to him or them, nothing in the said act contained should extend to compel such persons to sell part only or less than the whole of such property; and after reciting that, by means of the purchases which the said Company were empowered and required to make by virtue of the said act they might happen to be seised of more lands, tenements, or hereditaments, than would be necessary for effecting the purposes of the said act, or of lands, tenements, or hereditaments, not wanted for or not applicable to the purposes thereof, it was further enacted by the 89th section, that

A Railway Company, being by their act empowered to sell any lands or hereditaments which they did not require for the purposes of their railway, were, by a proviso in the same act, directed, before they should dispose of any such lands, to offer to sell the same to the person or persons whose lands should immediately adjoin the lands, &c., so proposed to be sold; the person from whom such lands, &c. were purchased, if the owner of the adjoining lands, to be always preferred.

The Railway Company put up certain premises for sale by auction, without having

made any offer to sell the same to the adjoining owners.

The defendant, who was the purchaser of part of the property sold, took this objection, whereupon the Company made an offer to the owner of the adjoining land, which was declined.

The defendant persisting in his objection, the Company filed a bill for specific performance, and the Court directed a case to a Court of law, which decided that, by the subsequent offer to the owner of the adjoining premises, the Company had a power to sell and convey the premises in question to the defendant.

Held, upon the equity reserved, that the circumstance of the Company not having, at the time of the sale, made the offer to sell to the owner of the adjoining land, did not prevent them from *contracting*, although it might have prevented them from carrying their contract into execution by a conveyance. That having set themselves right by their subsequent offer, they had a right to enforce the contract.

Specific performance, without costs, decreed.

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it should be lawful for the said Company to sell, and, by any deed under their common seal, to convey any part of such lands, tenements, or hereditaments, or of any estate or interest purchased by the said Company, in such lands, tenements, or hereditaments, or any part thereof, either together or in parcels, by public auction or private contract, as they should deem most advantageous to such persons as should be willing to contract for and purchase the same; and that such conveyances from the said Company should be valid and effectual, any thing in the said act contained, or any other law, statute, or custom to the contrary notwithstanding. *Provided always that the said Company, before they should dispose of any such lands, tenements, or hereditaments, should first offer to sell such lands, tenements, or hereditaments to the person or to the persons successively in such order, as the said Company should deem meet, whose lands or premises should immediately adjoin the lands, tenements, or hereditaments so proposed to be sold, the person from whom such lands, tenements, or hereditaments, if the owner of the adjoining lands, to be always preferred, such persons being in England and conveniently found, and being capable of entering into a contract for the purchase of such lands, tenements, or hereditaments. That under or by virtue of the said act of Parliament, plaintiffs were required to purchase divers houses in Bermondsey-street, Red Lion Court, and Sugar Loaf Court, a great part of which property was not required by them for the purposes of the railway, and two of the said houses (lots 17 and 18) adjoining to the property of Mr. S., were offered to, and declined by him, but the remainder of the said premises were not, previous to the sale by auction, offered for sale to any person, because it consisted of separate houses to be sold in separate lots, and because such lots were bounded by streets or courts, or by land of the Company, not then intended to be sold.*

That the said premises (together with other premises)

were put up for sale by auction, at which the defendant was declared the highest bidder for lots 10, 11, 12, 14, 15, 16, 17, and 18, and paid the deposit money and auction duty and signed an agreement for the payment of the remainder of the purchase-money and completion of the purchase in the month of May following. That the defendant, amongst other objections to the title, objected thereto, because it did not appear that the whole of the said houses and premises had been previously offered to the owners of the adjoining lands and premises.

The houses and premises were afterwards (on the 11th September, 1837) offered to the adjoining owners, who declined to purchase; and the bill prayed that the defendant might pay the remainder of the purchase-money and complete the purchase, on his part, according to the conditions of sale.

The defendant, by his answer, insisted on the objection stated in the bill.

On the 6th February, 1839, it was referred to the Master to enquire whether a good title could be made by the plaintiffs to the premises in the pleadings mentioned, or to any part thereof, and, if so, when such good title was first shewn; and, on the 27th July, the Master reported that a good title could be made by the plaintiffs to the whole of the said premises, and that such good title was first shewn as to lots 17 and 18 at the time of the delivery of the abstract, and, as to the remainder of the premises, on the 11th September, 1837. This report was confirmed nisi on 1st of August, 1839.

To this report the defendant filed three exceptions; First, That the Master ought to have found that a good title could not be made by the plaintiffs to the whole of the premises sold to the defendant.

Second, That a good title could not be made by the plaintiffs to any part of the premises.

Third, That the Master ought not to have found that

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such good title was first shewn as to lots 17 and 18 at the time of the delivery of the abstract of title, and, as to the remainder of the premises, on the 11th September, 1837.

By an order of the 22nd November, 1841, a case was made for the opinion of her Majesty's Court of Queen's Bench, "Whether, under the enabling part of the 89th sect. of 3 Will. 4, c. xlv, on the 11th day of September, 1837, the London and Greenwich Railway Company could sell and convey the premises in the pleadings mentioned to the defendant."

To this case the following certificate was returned, "That the London and Greenwich Railway Company could, on the 11th day of September, 1837, sell and convey to the said Joseph Goodchild the hereditaments comprised in the lots agreed to be purchased by him."

The exceptions now came on to be argued.

Mr. *Stuart* and Mr. *Chandless*, in support of the exceptions.—The only thing that was decided by the Court of Queen's Bench was, that the offers which the Company made, subsequent to the contract with the defendant, were sufficient offers, within the 89th section of their act; but that has left untouched the question of equity, which remains, namely, whether it was competent for the Company to enter into a contract before they had made the offers to the adjoining occupiers. We submit that the terms of the act of Parliament not having been complied with, the Company were not at liberty to enter into an unconditional contract to sell. If, indeed, the contract had been that they agreed to sell, provided certain persons having a right of pre-emption refused to purchase, then we admit that that would be a valid contract. The purchase was, according to the terms of the contract, to have been completed in May, and interest to be paid at five per cent.,

but now the plaintiffs say it is sufficient if we shew a good title in September.

Mr. *Spence*, Mr. *Bethell*, and Mr. *Twells* appeared for the plaintiffs, but were not heard.

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The VICE-CHANCELLOR.—Sufficient appears upon the answer, with reference to the allegation of there having been no offer, to have enabled the defendant to make the objection that the contract was a fraud upon him, the defendant. It appears to me that the mere circumstance of the Company not having, at the time of the sale, made the offer, was not such a misfeasance as that it made it improper for them to contract. I cannot but think this is a case in which the Company may lawfully file their bill for specific performance, supposing they have a good title and can convey. The act of Parliament only interposes a sort of condition previous to the conveyance, but it does not affect the title; it says, "if they may happen to be seised of more lands," &c. than might be necessary for the purposes of the railway, it shall be lawful for them to sell, &c., "Provided always that the said Company, before they shall dispose of any such lands, tenements, or hereditaments, shall first offer to sell such lands," &c. to the owners of the adjoining property. No doubt that proviso would have the effect of preventing the Company from carrying the contract into execution, in case the parties having the option of electing to take the premises should so decide; all that is made unlawful is to dispose of or convey the premises without giving the option of purchasing to those pointed out by the act of Parliament.

The point not having been exactly put before the Court of Queen's Bench, I am not prevented from saying that they can *contract*, though they cannot *convey*. I think that notwithstanding that defect as to the conveyance, yet, when the company did set themselves right according to the Act of Parliament, they acquired a right to enforce

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the contract they had previously made. This is merely an objection of conveyance.

Mr. *Spence*, Mr. *Bethell*, and Mr. *Twells* for the Company, asked for the costs of the suit, and cited *Scoones v. Morrell* (a).

Mr. *Stuart* and Mr. *Chandless*, contra, contended that they were bound to take the opinion of a Court of equity upon the question, which was by no means decided by the Court of Queen's Bench.

THE VICE-CHANCELLOR.—This case seems to me to differ from the common case, where a person having a good title contracts for a sale, but does not shew a good title upon his abstract, but ultimately does shew a good title; if the title was not shewn to be good, until after the suit was instituted, he does not get the costs incurred prior to the good title shewn, but does get those incurred after the good title shewn.

This case is not like that; for the act of Parliament, which gave the rights and powers to the Company, imposed this very condition upon them, and they must have known that at the very time of the contract they had not done that which would have enabled them to convey in accordance with that contract, and the doing of which afterwards would leave it quite uncertain whether they could ever perform the contract; for when they made the offer, in compliance with the act of Parliament, it might have been accepted; therefore, with a full knowledge of their not having complied with the act of Parliament, which alone gave them power to make a binding contract, they entered into an absolute contract. In common fairness, the purchaser ought to have been apprised of the grounds upon which he stood, for he was to pay his purchase-money upon

(a) 1 Beav. 251.

the 12th May, and he might then get such title as he could; the contract at that time might have been waste paper. I think that strict justice will be answered in this case by giving no costs up to this time.

Decree for specific performance. No costs.

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BEFORE V. C. KNIGHT BRUCE.

Ex parte the TRUSTEES of the WASTE LANDS of BOXMOOR,
in re THE LONDON AND BIRMINGHAM RAILWAY COM- *March 29.*
PANY.

THIS was the petition of the trustees of the waste lands on Boxmoor, which stated that the Birmingham Railway Company had, under the provisions of their act of Parliament (*a*), purchased a portion of the waste land on Boxmoor, for the purposes of their railway, and had paid the purchase-money into the Bank of England, pursuant to the 39th section of their act, which, under the 42nd section, was to be re-invested in land. The Master approved of two purchases, which exhausted the whole, and the petition prayed (*inter alia*) that the costs of the two purchases might be paid by the Company.

When purchase-money of lands taken by a railway Company, under the provisions of their acts, is directed to be paid into Court and re-invested in the purchase of other lands, the Court will allow the costs of two such investments.

Mr. *E. F. Moore*, in support of the petition, cited Ex parte *Eton College*, in re *The London and Birmingham Railway Company* (*b*).

Mr. *Bacon*, for the Railway Company, consented to pay

(*a*) 3 & 4 Will. 4, c. xxxvi.

(*b*) *Antè*, p. 271.

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the costs of one purchase, but submitted that it was not the custom of the Court to allow more than one such set of costs.

V. C. KNIGHT BRUCE.—I shall allow the petitioner the costs of both the purchases.

BEFORE V. C. OF ENGLAND.

April 20th.

Costs of a third re-investment of purchase-money granted to the vendor, the entire purchase-money being very large.

In the matter of THE ST. KATHERINE'S DOCK COMPANY.

THIS was a petition by a person who had sold property to the Company of the railway for £125,000, praying a third investment of a portion of the purchase-money in lands, and also for the costs of the application.

Mr. *Bethell* for the petitioner.

Mr. *Stuart*, *contrà*.—The Company have already paid costs, amounting to 1576*l.* 4*s.* 10*d.*, upon two investments. It is in the discretion of the Court in all these cases either to grant or refuse the costs; and it becomes a question what is a reasonable amount for costs of a vendor. The other branches of the Court have decided that, in cases of more than two re-investments, the Court is not disposed to impose costs upon the Company. Ex parte *Eton College*, in re *The London and Birmingham Railway Company* (a); and ex parte *The Trustees of the Waste Lands of Boxmoor*, re *The Birmingham Railway Company* (b).

The VICE-CHANCELLOR.—The purchase-money in this case is very large. I do not think that in this case there is anything oppressive.

Ordered as prayed.

(a) *Antè*, p. 271.

(b) *Antè*, p. 513.

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MITCHELL v. NEWELL, re The Manchester and Leeds
Railway Act.

March 29th.

THIS was a petition presented on behalf of the plaintiff, an infant, heir-at-law of his brother, who had died intestate, praying the investment of a sum of £500, part of a larger sum, standing in his name, the purchase-money of land taken by the Manchester and Leeds Railway Company under the power of their act (7 Will. 4, c. cxi).

The petition also prayed a reference to the Master to tax the costs, charges, and expenses of the parties interested in the hereditaments sold to the Company preliminary and incident to the agreement for sale, and to the orders directing a reference to the Master and his report, and the confirmation thereof, and also the costs of the present application, and of the investment of the said sum of £500, *and of the payment of the dividends of the Bank Annuities to be purchased therewith and incident thereto*; and that such costs, charges, and expenses, when so taxed, might be ordered to be borne and paid by the said Company.

Upon the construction of the 157th section of the Manchester and Leeds Railway Act (a) (7 Will. 4, c. cxi), *Held*, that the costs of the payment of the dividends to accrue in respect of a sum the produce of lands taken by the Railway Company, and ordered to be invested, were not to be borne by the Company.

Mr. *Bacon*, for the Railway Company, objected to that part of the prayer which asked the costs of the payment of the dividends on the Bank Annuities to be purchased with the £500.

Mr. *Rasch*, for the petitioner, relied on the 157th section of the Act (a), under which he stated he had already, on similar applications to the Court of Exchequer, been allowed the costs which the Company on the present petition objected to pay.

(a) "That, where, by reason of any disability or incapacity of any party entitled to any lands to be taken or used under the authority of this act, the purchase-money for the same shall be required to be paid into the Bank of England, it shall be lawful for the said Court to order the costs, charges, and expenses attending the purchase, or the taking or using of such lands, or which might be incurred incon-

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The VICE-CHANCELLOR declined to be bound by the decisions of the Court of Exchequer, and made the order as prayed, except as to the costs of the payment of the dividends.

sequence thereof, and of the investment of the purchase or compensation-money in other lands, or so much of such several costs, charges, and expenses occasioned only by the passing of this act, and not by litigation between claimants or otherwise, of any proceedings had or hereinbefore authorized for the investment of such purchase or compensation-money in Government or real securities, and for the payment of the interest and dividends thereof, and of such

Government and real securities, or of the money to be produced by sale thereof out of Court, together with the necessary costs and charges of obtaining the proper orders for such purposes, to be paid by the said Company out of the monies to be received by virtue of this act; and the said Company shall from time to time pay such sums of money for such costs, charges, and expenses as the said Court shall direct."

BEFORE THE MASTER OF THE ROLLS.

19th Dec. *Ex parte* THE GREAT WESTERN RAILWAY COMPANY, re RHODES, a Solicitor (*a*).

A railway Company applied by motion, under one of their acts, for an order of reference to tax a bill of costs sent in by the solicitor of a person of whom the Company had purchased land.

THIS was a motion by the Great Western Railway Company, under the 2 Vict. c. cxxvii, s. 16 (*b*), for the purpose

It appearing that a special agreement existed between the parties, the Court refused the motion with costs, on the ground that it had not, on an application of this sort, an opportunity of considering whether, under the terms of the agreement, the question of costs was or was not within the jurisdiction of the Court.

(*a*) Attornies and Solicitors Act, 6 & 7 Vict. c. 73.

(*b*) Sect. 16. "That in all cases in which any costs, charges, and expenses payable, or which, under the acts hereinbefore referred to relating to the said railway or any of them, are directed to be paid by

the said Company, shall be taxed by the Master or other proper officer of the said Court of Exchequer, under any order of the said Court, (and which order it shall be lawful for the said Court, on petition, to be presented by the said Company, or on motion or other

of obtaining an order of reference to tax the bill of Thomas Rhodes (the solicitor of Robert Palmer, Esq.), for the recovery whereof an action at law had been commenced in the name of the said R. P. against the Company.

From the affidavits filed in support of this motion, it appeared that in December, 1836, the Railway Company agreed with the said R. P. for the purchase of certain lands, of some of which he was seised in fee and of others for life, which were required by the Company for the purposes of their railway, and that thereupon certain articles of agreement were entered into by the said R. P. with the Railway Company.

By the 4th clause of these articles, it was agreed that all the vendor's expenses in consequence of that present contract, and for carrying the same into effect, as well as all the expenses of the purchasers, should be borne and defrayed by the Company, pursuant to the provisions of their act of the 6 Will. 4, c. cvii (a).

summary application, to make), the amount at which such costs, charges, and expenses shall be so taxed as aforesaid, together with the costs and expenses attending the taxation of the same, and of or occasioned by the order or orders referring the same for taxation, shall be paid and borne by the said Company, unless one-sixth of the said costs, charges, and expenses, the subject of any such order, shall be disallowed, or taxed off, and in every case in which one-sixth part of the costs, charges, and expenses shall be disallowed, or taxed off as aforesaid, all the costs, charges, and expenses of obtaining such order or orders of reference as aforesaid, and of or attending the taxation of the costs, charges, and expenses aforesaid, shall be

paid and borne by the person or persons from whom the lands in respect or in relation to which the costs and expenses in any such order of reference mentioned shall have been incurred, shall have been purchased or taken, and the amount thereof shall be paid to the said Company on demand accordingly, or, if circumstances will admit, may be retained by the said Company out of any monies payable by them to or on account, or on behalf of such person or persons as aforesaid."

(a) The material sections of this act were the following:—

Sect. 9. "That where by reason of the disability or incapacity of any person or corporation entitled to any lands, tenements, or hereditaments, and to be taken under

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That in May, 1844, R. P. or T. R. in his name and as his solicitor, commenced an action of covenant against the Company in her Majesty's Court of Common Pleas for

or by virtue of this or the said recited act, or from any other cause whatsoever, the purchase-money for such lands, tenements, or hereditaments, or any money to be paid for or by way of compensation or satisfaction for any injury or damage done to the same shall be required to be paid into the Bank of England, and be subject to the orders and directions of the Court of Exchequer, under the provisions contained in this and the said recited act, it shall be lawful for the said Court to order all the reasonable costs, charges, and expenses attending such purchase, taking or using of any lands, tenements, or hereditaments, or which may be incurred in consequence thereof, and also of the investment of the purchase or compensation-money paid in respect of such lands, tenements, or hereditaments, in real or government securities, and likewise of the re-investment of such purchase or compensation-money, or the government and real securities purchased therewith in the purchase of lands, tenements, or hereditaments as hereinbefore mentioned, together with the costs, charges, and expenses of obtaining the proper orders, and of all other proceedings for such purposes, and of the payment of the dividends and interest of the said government or real securities, and of the payment of the principal of the said purchase or compensation-money, and of the government or real securities purchased therewith out of

Court, to be paid by the said Company, and the said Company shall from time to time pay such sums of money, for the said costs, charges, and expenses as the said Court shall direct."

Sect. 10. "That all the costs, charges, and expenses on the part, as well of the seller as of the purchaser, of all conveyances and assurances hereafter to be made, of any lands and hereditaments which shall be purchased or taken by the said Company for the purposes of this and the said recited act, and of furnishing the abstract, and of deducing, evidencing, and verifying such title as the said Company may require, to the said lands hereditaments, and premises, and of all attested copies which the said Company may require, of any deeds, evidences, or writings relating, and all expenses whatsoever incident to the deduction, investigation, or verification of such title, shall be exclusively borne and paid by the said Company; and the said Company, before entering into possession of the lands and hereditaments so purchased, shall pay the amount of such costs, charges, and expenses; or, in case there shall be any dispute about the same, shall deposit, for the purpose of paying the same, in such manner as hereinafter mentioned, the amount of the costs, charges, and expenses claimed by the party or parties from whom the lands and hereditaments shall be purchased. Provided always, that the said Com-

£1000 for costs, charges, and expenses in respect of the said agreement.

That, in pursuance of an order made in the said action, T. Rhodes delivered a bill of costs amounting to £740.

That a rule nisi was afterwards granted by the Court of Exchequer to the Railway Company, calling upon R. P. and T. R. to shew cause why the said bill of costs should

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pany shall not be prevented from entering into possession of the lands and hereditaments so purchased, by reason of the non-payment of the said costs, charges, and expenses, or by reason of the deposit herein mentioned not having been made, unless the party or parties, from whom such lands and hereditaments shall have been purchased, shall, within seven days after notice in writing for that purpose shall have been given to them by the said Company, deliver a bill of their said costs, charges, and expenses to the said Company, with the name of a solicitor, as their referee for the purposes hereinafter mentioned, and if the said Company and the party or parties aforesaid cannot agree as to the amount of such costs, charges, and expenses, the said Company shall name a solicitor, as a referee on their part, and deposit the amount of the costs, charges, and expenses claimed by such party or parties aforesaid, in the hands of the said two referees to answer the same; and such costs, charges, and expenses shall be settled and determined by the said two referees, or, in case they should differ about the same, then by a third solicitor, as umpire, to be named and appointed by such two first referees, before they pro-

ceed on the matter referred to them. And the award and determination of the said two referees, or of the said umpire, as the case may be, shall be binding and conclusive, and shall be made within one calendar month from the time of making such deposit as is hereinbefore mentioned; and, upon such award and determination being made, the said two referees shall, by and out of the money so deposited with them, pay to the party or parties, from whom the said lands and hereditaments shall be so purchased as aforesaid, the amount of the costs, charges, and expenses which shall be so awarded and determined; and the remainder of the said money so deposited shall be returned to the said Company. Provided also, that the expense of determining such costs, charges, and expenses, as aforesaid, shall be paid and borne by the said Company, unless one-sixth of the said costs, charges, and expenses shall be disallowed, in which case the expense of determining the same shall be paid and borne by the said sellers; and the amount thereof may then be deducted by the said Company from the sum payable by them under the award and determination of the said two referees, or of the said umpire."

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not be referred for taxation, grounded on the 16th section of the 2nd Vict. c. cxxvii, which rule nisi was, upon argument, discharged.

Mr. *Turner* and Mr. *Stevens*, in support of the motion.—The provisions made by the 6 Will. 4, for referring disputes as to costs, are so made for the purpose of ascertaining the costs, with a view to possession. Under those provisions the costs must be ascertained and paid, if possession be required, in the mode pointed out by the act; but this case is, by the special agreement entered into between the parties, taken out of the provisions of the act. Under this agreement, the possession is provided for otherwise than as the act points out, consequently the mode of ascertaining the costs is taken out of the act also: *Lees v. Nuttall* (a).

Mr. *Kindersley*, contra.—The Railway Company could only have had the power of taking the lands in question under the powers of their act, R. P. being tenant for life only of part of the lands taken; and therefore the bill of costs consequent on the purchase must be subject to the provisions made by the act, and could not be subject to the jurisdiction of any Court. There is a mode pointed out by the act for settling disputes about the amount of bills of costs, and by that mode alone is it competent for the Company to proceed.

Mr. *Turner* replied.

THE MASTER OF THE ROLLS refused the motion with costs, on the ground that, on an application of this sort, the Court had no opportunity of considering the special agreement entered into between the parties, nor whether it provided any mode for ascertaining costs, or not.

(a) 2 My. & K. 284.

The judgment was as follows :—

THE MASTER OF THE ROLLS.—I apprehend the jurisdiction which is given to this Court under the act, relative to attornies and solicitors, is only a jurisdiction to ascertain the quantum payable by one party to another; that is, by the attorney or solicitor to the client, or by the client to the attorney or solicitor, and does not extend to determine whether there is or is not a special agreement between the parties as to the mode in which the taxation is to be made, or in what manner the costs, charges, and expenses are to be paid or settled. If it were so, I scarcely know of any bills of costs which might not be drawn up under a partial description of that kind, and thereby lay a foundation for fraud, or, at least, create a great deal more dissatisfaction and misunderstanding among parties filling the relative position of solicitor and client to each other.

There are some things not disputed in this case, but others are in dispute; but, first of all, I gather, from the facts stated, that the Great Western Railway Company do not dispute their liability to pay the costs, charges, and expenses of the solicitor of Mr. Palmer, incurred in respect of certain lands they were under an agreement to purchase from him. And, in the next place, Mr. Palmer does not allege that the Company are bound to pay any other than his reasonable costs, charges, and expenses.

On the one hand, there is an admission of the liability to pay, and, on the other, an admission of the right to have that liability reduced, if extended beyond its proper limit; and, on the whole, it appears to me, the only difference between the parties is, as to the mode in which that reduction is to be effected, and the true amount of the costs, charges, and expenses claimed by Mr. Rhodes, ascertained. The Great Western Railway Company alleges that the taxation is to be obtained by a reference under an order of the Court; but Mr. Palmer urges that the amount claimed ought to be referred to the consideration of a solicitor.

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If this contract for the purchase of Mr. Palmer's property had not the particular clause referred to, it appears to me that, although costs, in the nature of those in question, were not taxable at the time when the contract was entered into, still, the contract not being then completed, those costs would be taxable: for, although the act of Parliament, under which the Great Western Railway Company proceeds, provides that all costs shall be taxable under an order granted by application to the Court; yet, in the ordinary acceptation of the words, I do not think it provides such a proceeding in the case of an agreement. There is one particular provision for ascertaining the costs, charges, and expenses, when the Railway Company are desirous of having possession of the property without having paid the money by a deposit of the money, or by a deposit of securities for the amount. That, in my opinion, does not come into operation here, because it was specially agreed between the parties that possession should be given to the Great Western Railway Company, upon the investment of the money agreed to be given for the purchase; it is specially provided by the acts of Parliament of this railway that all the costs, charges, and expenses of the vendor to the Railway Company, shall be borne by the Railway Company, pursuant to the last act of Parliament, and that they shall be taxed. Then arises the conflict whether these words "that all the vendor's costs, charges, and expenses shall be borne by the Company, pursuant to the provisions of the last act of Parliament," mean that they should be dealt with in the manner claimed by the Company, considering the existence of the agreement.

It is allowed, on the one hand, that that applies only to the question of what are the costs, charges, and expenses to be paid by the Company; on the other hand, it is said; "we admit it refers to that, but we say it refers also to the mode in which the amount of those costs, charges, and expenses shall be ascertained."

I do not know whether that be a true construction or

not, although upon this motion I may not express any certain opinion on that subject, yet I may think it is not; but can I, upon a motion made without a cause subsisting, take upon myself to determine what is the effect of an agreement upon which an action at law is at this moment pending, which action is not sought to be restrained? To have justified an expression of my opinion there ought to have been a bill praying an injunction to restrain the action, and then there would be no danger of far greater difficulties arising and more expensive litigation to the parties ensuing. I am, however, desired to say, that this agreement cannot apply to such a case as supposed by the Company's act, but I think I have no jurisdiction to do that, whatever my opinion may be on the subject. Then, I am desired further to say, even if I should be of opinion that this agreement does refer to the mode of taxation, and that it does import an agreement for taxation, that the other act (the Company's act) ought to be applied to those costs, charges, and expenses payable under the terms of the agreement entered into by the parties: it may be so, but I think I have not jurisdiction to do so on such an application as the present. There is an action pending: if it were in a cause, and there were circumstances of an equitable, as well as of a legal nature, there ought to be an application to the Court having jurisdiction over the equitable circumstances for an injunction to restrain the legal proceedings; but, if there be no legal defence, and there be an equitable defence, that equitable defence must be made in this Court upon a bill filed claiming equitable relief. Upon the whole view of the facts of this motion, I am of opinion I have no jurisdiction to enter upon it, and I therefore refuse it. I do not mean to say that the Company are not right in the view they have taken of this bill of costs, but I have not jurisdiction upon this application.

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 Ex parte
 THE GREAT
 WESTERN
 RAILWAY CO.
 vs
 RHODES.

Motion refused, with costs.

M M 2

1844.

BEFORE V. C. WIGRAM.

30th & 31st
May, & 1st,
6th, 7th, 11th,
27th, & 28th
June.

CORY v. THE YARMOUTH AND NORWICH RAILWAY
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BILL filed the 22nd May, 1844, stated, that Robert Cory was seised of a farm called the Ferry Farm, on the west side of the river Bure, and of a ferry from Great Yarmouth over the river Bure to the Ferry Farm, and to a road leading to Reedham, Hallowgate, and other adjoining parishes and places, and vice versa; and that there was no other ferry within two miles of it. And that, by virtue of an act of Parliament (7 & 8 Geo. 4), passed on the 28th May, 1827, the said R. C., his heirs and assigns, were authorised to build and maintain a bridge, and to take certain prescribed tolls for passengers, beasts, and carriages passing over the river, otherwise than by the bridge, should subject themselves to a penalty of 40s. for every such offence, to be recovered in a summary way before a justice of the peace, and levied by distress, and, in case of insufficient distress, a power was given of committing the offender; any party aggrieved might appeal to the quarter sessions, but it was enacted, that no order or proceedings under the act should be removed by certiorari or any other suit or process to any Court of record at Westminster. The Yarmouth and Norwich Railway Company purchased of the owner of the ferry a piece of land for a terminus, within the undoubted limits of the ferry, and a clause was inserted in their act, that they would not erect a bridge over the river Bure, without the consent of the plaintiff or owner for the time being of the bridge; and that nothing therein contained should prejudice or affect the right or title of the plaintiff to the bridge or ferry, or the tolls payable in respect thereof. The Railway Company, upon the opening of their line, dug a canal to the river, and, by means of a steam-boat, conveyed their passengers, &c. from their terminus to a part of Yarmouth much below the site of A.'s bridge.

On a motion for an injunction to restrain the Railway Company—*Held*, that, where the injury is small, and the means of approximating very nearly to the amount of probable damage are given, and where there is no reasonable ground for apprehending an infringement of right by others, the Court will not prejudice the legal question by granting an injunction, but will put the parties on certain terms until the decision of the legal right.

That where the Court is not clearly satisfied with respect to the legal right, it will be guided by the balance of inconvenience.

That irreparable mischief or extreme damage, which cannot afterwards be compensated, or the impossibility of ascertaining the proximate amount of damage, will afford sufficient reasons for the interference of the Court.

That where the whole question is fully before the Court by affidavits, so that the points in dispute are sufficiently and distinctly raised, the Court will direct an issue upon an interlocutory application.

That where the only remedy given by an act is by recovering penalties *de die in diem*, in a summary way, this Court has the power of protecting, by injunction, the right of the person in whose favour such remedy is given.

ing over the same; and the said tolls were vested in Robert Cory, his heirs and assigns. And it was by the said act enacted(a), that, if any person, subject to any of the said tolls, after demand thereof made, should neglect or refuse to pay the same, it should be lawful to stop such person, the beast, cattle, or carriage, for or in respect of which the said tolls ought to be paid, until full payment thereof, or to seize and distrain any horse, &c. ; and, if such tolls, and the reasonable charges of such seizure should not be paid within three days after such seizure, then a power was given to sell the same, and pay thereout such tolls and the reasonable charges occasioned by such seizure and sale. And it was further enacted, that, in case any dispute should arise respecting the demand, or taking, or the payment of any toll, it should be lawful for the person distraining to retain such distress, or the money arising from the sale thereof, until the amount of toll due, and the charges of keeping and selling such distress, and all matters in dispute, should have been heard and determined by some justice of the peace for the county of Norfolk or the borough of Great Yarmouth, who was thereby given all necessary power for that purpose. The bridge was, by the said act, made a public bridge, on payment of the tolls, and not a county bridge; and it provided, that, if any person should in any manner convey any person, beast, &c. across the said river Bure within the limits of the present ferry, otherwise than over the said bridge, or should be in anywise aiding or assisting therein, in order or with an intent to evade, or by means whereof should be evaded, the payment of any toll thereby granted, every person so offending should forfeit and pay any sum not exceeding 40s. for every such offence; such penalty, in case of non-payment thereof, to be recovered by the order and adjudication of the said justice, and afterwards to be levied, on non-pay-

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(a) The sections containing these enactments are the 2nd, 3rd, 5th, 6th, 12th, 13th, 23rd, 30th, 31st, 32nd, 33rd, and 34th.

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ment, by distress and sale of the goods and chattels of the offender, one moiety of the penalty to be paid to the informer, and the other half to the said Robert Corey, or to the owner or owners, proprietor or proprietors, of the bridge for the time being.

In case of non-payment of the tolls, a power was given to the justice to commit an offender to gaol for any time not exceeding three months; and also to proceed by summons; and the act provided, that, if any person or persons should think himself, herself, or themselves aggrieved, they might appeal to the justices at quarter sessions; and that no proceedings should be vacated or quashed for want of form only, or be removed or removeable by certiorari, or any other process or writ, into any of his Majesty's courts at Westminster, any law or statute to the contrary notwithstanding. And it was further provided, that the said act should be deemed and taken to be a public act.

After the passing of the act, the plaintiff, who was the son and devisee of the said Robert Cory, built a suspension bridge, which was opened for public use in 1829.

On the 23rd February, 1842, an agreement was entered into by the plaintiff, with the provisional committee of the Yarmouth and Norwich Railway Company: 1st, That the plaintiff should sell to the Company so much of his land as should be required by them for their railway, or for their terminus, depôts, or stations for passengers and goods, at a valuation to be made as therein mentioned; and the 5th and 6th clauses provided, that the said Railway Company should, after the passing of their act, have a right of way from the foot of the suspension bridge, of twenty-four feet in width, over certain land therein mentioned; and that the said Company should not erect, or procure to be erected, a bridge over the river Bure, without the consent of the owner or owners for the time being of the suspension bridge, and should introduce into their bill a clause restricting them from so doing; the plaintiff agreeing to

keep the said suspension bridge, and the approaches thereto, in good repair, and that the same should, at all times, be of a width adequate for the accommodation required by the traffic for passengers, goods, cattle, and carriages, to and from the said railway. And, by the 10th clause, it was agreed that the Railway Company should introduce into the bill a clause for confirming the said agreement, and such other clauses as the plaintiffs should consider necessary for giving effect thereto.

On the 18th June, 1842, the Yarmouth and Norwich Railway Act passed, and it was thereby, among other things, enacted, that the Company should not erect, or procure to be erected, a bridge over the river Bure, without the consent of the plaintiff, or owner for the time being of the suspension bridge; and that nothing therein contained should prejudice or affect the right or title of the plaintiff to the suspension bridge, or to the ferry or tolls payable in respect thereof respectively.

After the passing of the act negotiations were entered into by the plaintiff and the Railway Company for granting a lease of the bridge to the Company, but no terms were finally concluded between them.

The Railway Company, in the year 1844, brought in a bill, containing, amongst others, clauses for the purpose of repealing the clause prohibiting them from building a bridge without the consent of the owners of the suspension bridge, whereupon the plaintiff presented a petition against this part of the said bill; and the committee, to whom the bill was referred, struck out the clause from the bill.

On the 1st of May, the Company opened their railway for the conveyance of passengers and goods, and on that day the plaintiff allowed the public the use of his bridge toll free; and, on the 2nd and 3rd days of May, the traffic from the railway passed over the bridge, and paid the tolls; but, on the 4th May, the Railway Company commenced carrying passengers, &c. from a canal made by them on the

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Ferry Farm, on land purchased from the plaintiff across the mouth of the river Bure to a quay called the Buck Quay, in Great Yarmouth, and vice versâ. The canal was not distant more than 190 yards from the site of the ancient ferry, and not more than 255 yards from the plaintiff's suspension bridge.

On the 4th May, 1844, a notice was sent by the plaintiff to the directors of the Yarmouth and Norwich Railway Company to desist from ferrying passengers from the west side of the river to Great Yarmouth or Southtown; but this notice was disregarded by the Company.

The bill prayed an injunction to restrain the Company from carrying passengers between the said Ferry Farm and Great Yarmouth, either from the said railway station to the Buck Quay, or any other part of Great Yarmouth aforesaid, or from their said railway station to Southtown, or from Great Yarmouth or Southtown to their said railway station; and also an account of passengers &c. thitherto conveyed.

The plaintiff gave notice of motion for an injunction, without having filed any affidavits, but two days after such notice he filed an affidavit, which was an echo of his bill; and, on the day preceding the day for which notice of motion had been given, he filed his other affidavits.

The defendants filed no affidavits.

30th May. Mr. Tinney and Mr. Wood moved for an interim injunction.

Mr. Russell, Mr. Romilly, and Mr. Borrett, opposed the application, on the ground that the plaintiff had taken more than three weeks to file his bill after the injury complained of had commenced. That he had kept back his affidavits, so that no affidavits could be filed by the defendants in reply. And that the amount of toll could

easily be calculated and ascertained by an account being kept of the passengers forwarded in the defendants' steam boat.

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The *Vice-Chancellor* refused the application for an interim injunction.

The plaintiff applied for a special injunction in the terms of the prayer of his bill.

The affidavits of the defendants (which were contradicted by those of the plaintiff) made five points:—1st, That the plaintiff had no legal ferry at all. 2ndly, That they had not crossed the river Bure, over which the suspension bridge was built, but had crossed a basin formed by the waters of the rivers Bure and Yare, and not the Bure alone. 3rdly, That they were not within the limits of the plaintiff's ferry, and that several other ferries existed in the immediate neighbourhood. 4thly, That the bridge was insufficient for the traffic. 5thly, That the plaintiff had acquiesced and allowed them to construct their basin and dock without making any objection.

Mr. *Tinney*, Mr. *Wood*, and Mr. *Hall*, for the plaintiff, cited *Tripp v. Frank* (a), *Huzzey v. Field* (b), *Anon.* (c), *Anon.* (d), *Harmer v. Plane* (e), *Pim v. Cruel* (f), and 20 Vin. Abr. "Toll," 289.

Mr. *Russell*, Mr. *Romilly*, and Mr. *Borrett*, for the defendants.

The right of a ferry is a question of law, and must be tried by a jury; and, until such right is established, the question does not come within the jurisdiction of a Court of equity. The limits of the ferry have not been ascertained or set out in the pleadings, and they must be de-

(a) 4 T. R. 666.

(d) 1 Ves. 476.

(b) 2 C., M., & R. 432; 5 Tyrw.

(e) 14 Ves. 130.

865.

(f) 6 Mee. & W. 234.

(c) 2 Ves. 414.

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fined before a Court of equity can interfere: *Farrow v. Vansittart* (a), *Bell v. Hull and Selby Railway Company* (b), *Bramwell v. Halcomb* (c), *Bacon v. Jones* (d), *Barnard v. Wallis* (e).

The plaintiff founds his title to this ferry on an act of Parliament, but a Court of equity always regards an act which creates a monopoly as favourably as possible for the public, and against the party claiming under it: *Stourbridge Canal Company v. Wheeley* (f), *Hull Dock Company v. La Marche* (g), *Leeds and Liverpool Canal Company v. Hustler* (h).

The old traffic of the ferry is not interfered with by the steamer conveying the passengers brought down by the railway. The railway has created that traffic, which never would have come to the city but for the railway.

11th June.

The VICE-CHANCELLOR.—In this case, it is not my intention to express any opinion as to what the rights of the parties are under the act of Parliament, and whatever I say is merely with a view to explain the grounds on which I feel myself quite at liberty to impose such terms as I think fit on either party. [After stating the facts of the case, his Honor proceeded.] That this act of the defendants is not within the powers conferred upon them as a Railway Company is beyond all dispute. I think I may add, it was never contemplated by the Legislature they were so to act. It cannot for a moment be doubted that the defendants do thereby deprive the plaintiff of a very great portion of traffic over his bridge, and this is not of less importance because a great number of passengers that go, in addition to those who went before, would probably never have gone but for the railway; for, the plaintiff would have

(a) *Antè*, Vol. I, p. 602.

(b) *Id.* p. 616.

(c) 3 *My. & Cr.* 737.

(d) 4 *My. & Cr.* 433.

(e) *Cr. & Ph.* 85.

(f) 2 *B. & Ad.* 793.

(g) 8 *B. & C.* 42; 2 *M. & R.* 107.

(h) 1 *B. & C.* 424. [See also *Barrett v. The Stockton and Darlington Railway Co.*, *antè*, Vol. 2, p. 443.]

the benefit of the whole of the increased traffic were it not for this steamer.

The plaintiff's right is entirely a legal right, and the province of equity, as Lord *Cottenham* has repeatedly said, is simply to protect legal rights, and this legal right must be tried at law. About that there is no dispute. The only question is, whether, pending the trial, I am to grant the injunction, or whether the right at law is to be established, before I grant the injunction that is asked. This question came repeatedly before Lord *Cottenham*, and has been the subject of many of his most elaborate judgments. In the case of *Bacon v. Jones (a)*, he went very much into the subject. The result of his observations is, that it is always a case for the discretion of the Court. If the Court is clearly against the plaintiff, it may refuse the injunction at once, merely giving him leave to proceed at law, (which he could not do without the leave of the Court pending a suit in equity), with liberty to apply, if he succeed at law. If, on the other hand, the Court is clearly with him, the Court may, in the exercise of its discretion, grant the injunction in the first instance, there being no doubt whatever, although the question is a legal one, and though a court of law is the proper tribunal before which such questions should be tried, that a Court of equity may decide the legal question if it think fit.

Supposing the question of legal right to be one about which the Court is not prepared to pronounce an opinion, the Court is generally governed by considerations of convenience on the one side or the other. If to the one party the doing the act complained of would be attended with irreparable or very serious mischief, and the Court sees it cannot repair the injury done afterwards, it will sometimes grant the injunction. If, on the other hand, there be a balance of inconvenience, the Court will generally leave the parties in the situation in which they are, until the legal right shall

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(a) 4 My. & Cr. 433.

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have been established. I have referred to the cases referred to during the argument, the most important of which is *Huzzey v. Field*, because there the opinion of the Court of Exchequer was taken, on a review apparently of all the cases which bore upon the subject. In that case the Court, advertg to the scanty authority to be found upon the subject, gave judgment, with a strong expression of doubt, as to whether it might not have come to an erroneous conclusion: it gave an opinion not very consistent with the case, although it laid down a great many general propositions.

Now, very extreme propositions have been argued on both sides:—the defendants say that the plaintiff's right is more limited in the bridge than it was in the ferry; they say also, that, whether that be so or not, the course of the defendants' steamer is wholly out of and beyond the river Bure; that the starting point and the landing point are both without the Bure; and that they never touch the river Bure in the course of their passage. They say it is enough for the defendants' purpose if one terminus of the passage of the steamer is out of the river Bure: they say nothing can be an infringement of the plaintiff's right, except a ferry, which shall start from one bank and land the passengers on the other bank of the river Bure. Now, this I call an extreme proposition; because, in this case the bridge, which is somewhat higher up, about fifty yards higher up than the ferry was, is not more than 250 yards from the mouth of the river. If the defendants' argument be right, then anybody may establish a ferry immediately adjoining the starting point of the plaintiff's ferry; and, provided he lands his passengers a yard out of the river Bure, on the other side, that would be no infringement of the old ferry, although, by offering superior accommodation, he might, by possibility, draw away the whole of the traffic.

The plaintiff, on the other hand, says, that no person going from the Ferry Farm to any spot on the Bure, or the

Yare, can fail to infringe his rights, if the spot at which the passengers are landed on the Yare is anywhere in the town of Yarmouth. In fact, the plaintiff says, nobody has a right to convey passengers from the Ferry Farm to Yarmouth except over his bridge, the consequence of which would be, that, if Yarmouth should (as London has done) extend itself for miles down the Haven, no person wanting to go to the extreme point could embark in the river Bure in a boat and pass down the Yare and land at the most extreme southern point of the town of Yarmouth without infringing his right. There are some very important observations on this subject in the case of *Huzzey v. Field*, where the judges advert to the different sorts of ferries—some being ferries connecting one town with another town, and others being ferries connecting one spot on a river with another spot on a river, without reference to any other. I refer to these, with reference only to the two propositions for which each party must contend, in order to maintain the extreme cases which they have put.

After referring to the acts of Parliament and to the cases, I think I ought not to grant this injunction upon the principle that the legal right is to be assumed to be in favour of the plaintiff; the question, therefore, comes entirely to one of relative inconvenience; and, in considering that, I shall advert to the case cited, of *Harmer v. Plane*, for the purpose only of observing, (although I shall always feel bound by the authority of that case, and by the reasoning of it), that, if parties are to infringe a patent right until the right is established at law, the patentee may be ruined by a number of cases which may expose him to necessary litigation in order to protect his right. I do not think that that reasoning applies to this case, because no one can suggest there is danger of anybody establishing a ferry merely in consequence of the Railway Company having done that which they have done. It is

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not like the case of individuals who may easily infringe a patent, and subject a party to expense. I think the case must be considered here as one in which I am adjudicating between two parties, without any danger of the plaintiff being damnified during the short time that must elapse before the trial, by my not interfering in the meantime.

I have only now to consider the comparative damage to the parties, and I still remain of the opinion I before expressed, that it will be impossible accurately to measure the quantity of damage the plaintiff will sustain, if, in the opinion of a Court of law, assisted by a jury, he shall be declared to have sustained any damage at all; and this, no doubt, is a reason why this Court should, in many cases, interfere. It is like a case of a copyright, or a patent of any kind. There is no constat what profit the patentee would have made if the party who infringed the copyright or the patent had not infringed it. A party may have the copyright of a work or a patent machine which the public would buy; but, if they could get as good an article from a party who has been at no expense in bringing the patent to maturity, at a cheaper price, it is impossible to say that that cheap price would be a compensation to the patentee, or, on the other hand, that he would have sold just as many of his patent machines as the party who infringed his right.

Although I am still of opinion that I cannot accurately measure the damage, still it appears to me that the plaintiff himself has furnished me with means of approximating so near to it, that, looking at this as a case in which the damage of the plaintiff is not laid at more than £3 a-day, and that this case may be tried within six weeks or two months from the present time, there is no danger of that extreme injury to either party which would arise if the injury were larger, or if there were no means of ascertaining it with tolerable certainty. The plaintiff, it appears, is able to say how many passengers have passed over his bridge during the last three years, how many

have passed in carriages, and how many have passed on foot: he has given it in his evidence. The defendants can keep an account of the number of passengers they carry, although, as I said before, an accurate measure of damages may never be attainable.

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It is quite clear, looking at the smallness of the amount of the damage to be sustained in money, there may be an approximation so near as to make the injury to them, not in any sense of the word, of an irreparable kind, or one from which the Court is bound to protect them, when it feels that the legal right ought to be tried in the first instance. Against that, I have to set off what I think a very inconsiderable injury to the defendants: I cannot believe one person less will go by the railway, because passengers are carried gratis by this steamer down to Buck Quay, than would go if each one had to pay a penny for crossing the bridge, or sixpence if he preferred a carriage; and, against that possible loss, is to be set off the expense of keeping the steamer by means of which the Company carry their passengers gratis. If they think there is danger in losing traffic, they have the means of reducing the amount of their fares precisely to the extent of the expense they would save by not working the steamer during the interim; therefore, I am not satisfied they will sustain any injury, but it is of a speculative kind, and I cannot, with certainty, measure it. Taking the case to be one in which there is no irreparable mischief, and no damage which may not be compensated, I think it ought to go to law, unprejudiced, which it would not do, if, in a case in which there is so little injury to be apprehended on either side, I were to pronounce an opinion in favour of the legal right, before the trial at law.

[His Honor then directed both parties to go to trial at the next assizes, putting them on certain terms, which are set forth in the minutes.]

The counsel for the plaintiff, on a subsequent day, men- 27th June.

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tioned to the Court that they could not suggest any form of action on which the plaintiff could proceed. That his only remedies were those given by the act, viz. to proceed in a summary manner before a justice of the peace for penalties, which would not settle the question of right in any way. Another difficulty under which the plaintiff laboured was, that he could not proceed against the Railway Company (being a corporation) in a summary manner for penalties. That the rights given him by his act were entirely independent of the common law, and therefore could not be ascertained, unless the Court would direct an issue; and, if the plaintiff then succeeded in establishing his rights, he would be entitled to a perpetual injunction from the Court to restrain any infringements of them by the Railway Company.

For the defendants, it was contended, that the fact of there being no remedy was the best proof that there was no right. It was suggested that the plaintiff might distrain, and that an action of replevin would raise the question; that directing an issue in so doubtful and complicated a case as this was contrary to the practice of the Courts: *Fullager v. Clarke (a)*.

The *Vice-Chancellor* said, with regard to directing an issue upon an interlocutory application, he understood the rule to be clearly laid down by Lord *Eldon*, that, if the Court could plainly see what the issue in the case was, it might properly direct that issue to be tried, but it would not do so if there was any doubt what the issue ought to be. It was true, that, until the answer was put in, the issue was not raised upon the pleadings; but, in this case, the whole question had been fully brought before the Court upon the affidavits, and had been amply discussed, so that the points in dispute were sufficiently and distinctly raised;

(a) 18 Ves. 481.

he therefore saw no objection, either in point of form or substance, to directing an issue, with respect to the remedy given by the act, which, it had been contended, was the measure of the legal right. It appeared to him, that, if it was admitted to be a case in which the plaintiff might recover penalties *de die in diem*, it was a case in which this Court would protect his right by injunction. The question of right might be tried by an issue to this effect,—whether, in contravention of the act, A. B. (an individual person) had carried passengers to and from the particular points referred to; the defendants admitting, upon the trial, that they had carried such passengers at certain times, and that the act of the Railway Company was the act of A. B.

The minutes were as follows:—

Let the parties proceed to a trial at law at the next assizes for the county of Norfolk, by a special jury of the County, on the following issue, viz.: Whether the Yarmouth and Norwich Railway Company have in any manner conveyed any passengers in contravention of the act of Parliament of the 7 & 8 Geo. 4, intituled, &c. And the defendants are to admit that they did, on the 4th May, 1844, convey passengers from the dock or basin, cut by the Company, near or adjoining to the present Yarmouth terminus of the railway, to the Buck Quay in Great Yarmouth, and vice versa; and are not to raise any objection on the ground of their being a corporation, and not an individual or company of individuals: and, in such issue, the plaintiff here is to be plaintiff at law, and the defendants here defendants at law, who are forthwith &c. The Master to settle such issue in case &c., and at the trial &c. any special matter to be indorsed on the *postea*. Usual direction as to books and papers; and let this motion stand over until after the trial of the issue. And the defendants are in the meantime to keep an account of all and every the passengers, carriages, horses, and cattle which may be in the meantime conveyed by the defendants, their servants or agents, in any steam-boat or other boat, in respect of which the plaintiff is or would be entitled to any payment or toll, if the same passengers &c. had respectively passed over the bridge, and, at the plaintiff's request, are to furnish him with a copy of such account, before the said trial, to be verified by the affidavit of the secretary of the said Company.

Liberty to apply*.

* At the trial of the issue, the Judge recommended a compromise, which was eventually agreed upon.

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20th & 21st
July.

PICKFORD and Another v. THE GRAND JUNCTION RAILWAY COMPANY.

The original bill was filed in June, 1843, and plaintiffs thereupon gave a notice of motion, supported by affidavits, for an injunction to restrain the defendants from making certain charges as carriers by railway, which the plaintiffs considered to be illegal. On the 1st of July defendants applied for time to answer the affidavits, and

THE original bill in this cause was filed on the 23rd of June, 1843, praying a declaration as to the rights of the plaintiffs, and also an order and injunction. Notice of motion for an injunction was given, on the 27th of June, for the 1st of July, which notice was in accordance with the prayer of the bill, and in the following terms:—"That the defendants, the Grand Junction Railway Company, their servants and agents, may be restrained, by the order and injunction of this Court, from directly or indirectly charging to the said plaintiffs, for the carriage of goods carried by such Company for the said plaintiffs, after higher rates than such Company charges to any other person or persons for the carriage of like goods under similar cir-

on the 15th their affidavits were filed. On the 6th of September and 23rd of November, plaintiffs filed further affidavits, and on the 19th of December affidavits were filed by the defendants in reply. On the 29th of January plaintiffs opened their case, and on the 29th of May applied for a day to resume the argument; and the 21st was fixed. A supplemental bill was filed on the 1st of June, and on the 29th the hearing was resumed, and the application was refused by the Vice-Chancellor of England, on the ground of delay, with costs. The Lord Chancellor, on appeal, affirmed the judgment of the Vice-Chancellor, with costs.

Where a party files a bill praying an injunction, and afterwards moves, on affidavit, for an immediate injunction—*Hel!*, that that can only be granted on the ground that to wait for the decree would be productive of great or unknown mischief to the plaintiffs.

Where a plaintiff does not press on his application, the Court will draw the conclusion that it is not of an urgent nature.

Where an option is given to a party sending packages containing small parcels, to pay according to an average, or to pay for the parcels separately, if the principle of an average be legal, and the amount of it reasonable, although the alternative requiring the party to pay for the separate parcels may be per se illegal, that will not render the demand to pay according to average illegal; and the Court will not grant an injunction until the illegality be established at law.

Whether defendants, being carriers only to Birmingham, can legally make the same charge to A. for the delivery of goods at Birmingham as they make to B. for delivery of goods at Worcester, B. agreeing to give the Company their whole custom, and agreeing to pay on certain articles an increased price—*Quære?*

cumstances; and from directly or indirectly charging to any other person or persons, for the carriage of goods carried by such Company for such person or persons, after lower rates than such Company charges to the plaintiffs for the carriage of the like goods under similar circumstances; and, in particular, that the Grand Junction Railway Company may be so restrained from directly or indirectly charging to the said plaintiffs, for the carriage of goods carried by such Company for the said plaintiffs to and from the terminus of the London and Birmingham Railway at Camden Town, in the bill mentioned, after higher rates than such Company charges, for the carriage of the like goods to and from the said terminus, to Messrs Chaplin & Horne, or the persons whose goods are carried by this Company, through the agency or by the means of the said Messrs. C. & H.; and from directly or indirectly charging to the said Messrs. C. & H., or such last-mentioned persons, for the carriage of goods to and from such terminus, after lower rates than such Company charges to the said plaintiffs for the carriage of the like goods to and from the said terminus. And that the said Grand Junction Railway Company, their servants, &c., may in like manner be restrained from directly or indirectly charging to the said plaintiffs, for the carriage of goods proceeding to and from Worcester, and carried by such Company for the said plaintiffs to and from the terminus of the said Grand Junction Railway at Birmingham, in the said bill mentioned, after higher rates than such Company charges, for the carriage to and from such terminus of the like goods, to Messrs. Southern & Son, or the persons, &c., and from directly or indirectly charging to the said Messrs. Southern & Son, or such last-mentioned persons, for the carriage to and from such terminus of goods proceeding to and from Worcester aforesaid, after lower rates than such Company charges to the said plaintiffs for the carriage to

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and from the same terminus of the like goods proceeding to and from Worcester aforesaid. And that the said Grand Junction Railway Company, their servants, &c., may in like manner be restrained from directly or indirectly charging to the said plaintiffs, for the carriage between Liverpool and Birmingham of goods proceeding by railway between Liverpool and London, and which are carried by the said plaintiffs between Birmingham and London, after a higher rate than such Company charges for the carriage of the same goods between Liverpool and Birmingham, when the same are carried by the said Company for the whole distance between Liverpool and London; and from directly or indirectly charging, for the carriage between Liverpool and Birmingham of goods proceeding by railway between Liverpool and London, and which are carried the whole distance by the said Company, after a lower rate than such Company charges the said plaintiffs for the carriage of the same goods between Liverpool and Birmingham, when the same are carried by the said plaintiffs between Birmingham and London. And that the said Grand Junction Railway Company, their servants, &c., may in like manner be restrained from charging to the said plaintiffs, for the carriage of boxes, bales, hampers, or other packages, containing parcels or other packages and things under 112lbs. weight each, when belonging to, or directed, consigned, or intended for different persons, or more than one person, after excessive or unreasonable rates, and in particular after the rate of 4s. per cwt., with an option to pay in lieu thereof the amount which would be payable in case such parcels, packages, or things, under 112lbs. weight, were carried separately."

Affidavits were filed on the part of the plaintiffs in support of their motion, and on the 1st of July the defendants applied for and obtained fourteen days' time to answer the affidavits, and on the 15th the affidavits

were filed. The 20th of July was the last seal-day before the vacation. By the 18th of August, the plaintiffs were ready with their evidence in reply, and served a notice of their intention to apply on the 21st of August for an early day for hearing the motion. This application was refused by the Vice-Chancellor of England. On the 6th of September and 23rd of November, the plaintiffs filed further affidavits; and, on the 25th, they applied for a day for hearing, which was appointed for the 12th December, on which day the motion was postponed, at the request of plaintiffs' counsel, to the 20th December; and on the 14th, 15th, and 19th of December, affidavits were filed by the defendants in reply. The 12th of January was then fixed, and on that day the defendants applied for time to answer the further affidavits, and the 29th was appointed, when the motion was brought on, and Sir Thomas Wilde occupied two days in opening the plaintiffs' case. On the 22nd February, the defendants filed three further affidavits. On the 29th of May an application was made by the plaintiffs to resume the argument on the motion, and the 21st of June was fixed by the Court. A supplemental bill was filed on the 1st of June. On the 29th, the argument on the original notice was resumed, and his Honor refused the motion, with costs, without hearing the counsel for the defendants, on the ground that the case was shewn, by the plaintiffs' manner of conducting it, not to be sufficiently urgent to induce the Court to interfere by injunction (*a*).

The affidavits in support of the motion stated, among other things, that the complainants were carriers who had

(*a*) The material clauses in the several acts of Parliament referred to in the argument were the following:—

3 Will. 4, c. xxxiv, s. 156, enacts,
"That it shall be lawful for the

said Company, and they are hereby authorised, if they shall think proper, to use and employ locomotive and other engines, or other moving power, and, in carriages and waggons drawn or pro-

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occasion to employ the Grand Junction Railway Company to carry goods for them between various places, and par-

pelled thereby, to carry and convey upon the said railway all such passengers, cattle, goods, wares, and merchandise, articles, matters, and things, as shall be offered to them for that purpose, and to make such reasonable charges for such carriage and conveyance as they may from time to time determine upon, in addition to the several tonnages and tolls hereinbefore authorised to be charged and received; provided that neither the said Company, nor any other person or persons using the said railway as carriers, shall ask, demand, or be entitled to take (both for tolls and carriage) any greater sums than the following; that is to say—

“For every person conveyed by the said Company or any other person in or upon any entirely open and uncovered carriage, or on the outside of any covered carriage, any sum not exceeding 2½d. per mile :

“For every person so carried in or upon any covered carriage, any sum not exceeding 3d. per mile :

“And for every person so carried in or upon any four-inside or mail carriage, any sum not exceeding 3½d. per mile.”

Sect. 165. “That the aforesaid tonnage, rates, and tolls to be taken by virtue of this act, shall at all times be charged equally, and after the same rate per ton per mile throughout the whole of the said railway in respect of the same description of articles, matters, or things, and that no reduction or advance in the said tonnage, rates, and tolls shall, either directly or indirectly, be

made partially or in favour of or against any particular person or persons, company or companies, or be confined to any particular part of the said railway, but that every such reduction or advance of tonnage, rates, and tolls, upon any particular kind or description of articles, matters, or things, shall extend to and take place throughout the whole and every part of the said railway upon and in respect of the same description of articles, matters, or things so reduced or advanced, and shall extend to all persons whomsoever using the same or carrying the same description of articles, matters, and things thereon, anything to the contrary thereof in anywise notwithstanding.”

4 Will. 4, c. lv, s. 19, after reciting, that, by a former act, it was enacted, that (subject to the limitations and directions therein contained) it should be lawful for the Company to use and employ locomotive and other engines or other moving power, and, in carriages and waggons drawn or propelled thereby, to carry and convey upon the railway, by such act authorised to be made, all such passengers, cattle, goods, wares, and merchandise, articles, matters, and things, as should be offered to them for that purpose; and reciting, that it was expedient that such powers should be extended and enlarged, enacts, “That it shall be lawful for the said Company to use and employ locomotive and other engines or other moving

ticularly between Liverpool and Birmingham, and between Manchester and Birmingham; and were desirous of employing the same Company to carry goods for them between Liverpool and Manchester and London. That the Company had acted in contravention of the acts of Parliament and rules of law applicable to carriers; and, in particular, in the month of November, 1840, had circulated a list of rates and charges for the carriage of goods between Liverpool and Manchester and Birmingham, and intermediate places, and the same contained a list of various kinds

power, and, in carriages and wagons drawn or propelled thereby, to carry and convey, as well upon and along the said railway as upon and along any other railway or railways, all such passengers, cattle, goods, wares, and merchandise, matters, and things, as shall be offered to them for that purpose, and to make such reasonable charges for such carriage or conveyance (not exceeding the amount specified in the said recited act) as they may determine on; and the said Company shall and may have and exercise all the same rights and remedies for recovery as well of the charges by the said recited act as of the charges by this act authorised to be taken for such carriage or conveyance, as are given to them by the said recited act in reference to the rates and tolls thereby made payable; or the said Company may, at their option, sue for and recover such charges, or any part thereof, in any Court of law or equity: provided always, that the provisions aforesaid shall not extend to take away or interfere with the rights of the proprietors of any other railway upon which the said

Grand Junction Railway Company may carry by virtue thereof."

3 Vict. c. xlix, s. 26, enacts, "That the charges by the said recited acts, or either of them, authorised to be made for the carriage of any passengers, goods, animals, or other matters or things to be conveyed by the said Company, or for the use of any steam power or carriage to be supplied by the said Company, shall be at all times charged equally and after the same rate per mile, or per ton per mile, in respect of all passengers and of all goods, animals, or carriages of a like description conveyed or propelled by a like carriage or engine passing on the same portion of the line only, and under the same circumstances; and no reduction or advance in any charge for conveyance by the said Company, or for the use of any locomotive power to be supplied by them, shall be made, either directly or indirectly, in favour of or against any particular company or person travelling upon or using the same portion of the said railway under the same circumstances as aforesaid."

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of goods, which were divided into seven different classes, wherein the rate charged for the carriage of goods for the whole distance from Liverpool or Manchester to Birmingham, was, for the first or lowest class, 16s. per ton, and 60s. per ton for goods of the seventh or highest class; and that the charge thereby appearing to be made for the carriage for the like distance of small parcels under fourteen pounds each was 1s. each; and such list contained a statement that "no single article separately consigned charged less than one hundred weight. Boxes, bales, hampers, or other packages, when they contain parcels, or other packages, or things under 112lb. weight, each directed, consigned, or intended for different persons, or for more than one person, 1d. per pound weight."

That the plaintiffs were in possession, in divers instances, of parcels under 112lb. weight, but together exceeding 500lb. weight, directed to different persons, but packed together in a single hamper, and required the defendants to carry the same; but the Company demanded 1d. the pound weight, or after the same rate as if each of the parcels contained therein was carried and paid for separately, and refused to carry the same unless so paid for.

That the rates and charges so demanded were unreasonable and unlawful, and were found to be so by the judgment of the Barons of the (a) Court of Exchequer.

That Chaplin & Horne were common carriers; and that plaintiffs and Chaplin & Horne had respectively warehouses at the end or terminus of the London and Birmingham Railway at Camden Town, connected with it by short branch rails, where they respectively took charge of and unloaded their trucks or waggons, and, in like manner, loaded and forwarded the goods delivered to them respectively to be sent by the railway.

That, in the month of June, 1840, the Grand Junction

(a) *Antd*, Vol. 2, p. 592.

Railway Company entered into an agreement with Messrs. Chaplin & Horne, whereby Messrs. Chaplin & Horne were to undertake the agency in London of the Railway Company, viz. the unloading and delivery at London of all goods from the Grand Junction line, as also the collecting, loading, invoicing, and portorage of as many goods as they could collect in London, at a charge of 10*s.* per ton, which should include compensation for the aforesaid duties and all risks, as also the costs of providing the necessary vans, waggons, sheets, ropes, &c.; and Messrs. Chaplin & Horne engaged not to send goods by any other conveyance for any point which could be directly served by the Grand Junction line. [The agreement also provided for the keeping accounts between Messrs. Chaplin & Horne and the London and Birmingham Company, and the monthly settlement of such accounts with the Grand Junction Railway Company.]

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In the month of January, 1841, the Grand Junction Railway Company fixed a scale of their rates for the conveyance of goods, which was issued in printed bills; among which were the following:—

RATES.	<i>Between Liverpool or Manchester and</i>	
	<i>Birmingham.</i>	<i>London.</i>
	<i>Per Cwt.</i>	<i>Per Cwt.</i>
Ale and porter, &c. . . .	1 <i>s.</i>	3 <i>s.</i>
Bales and cases of linen, &c. . .	1 <i>s.</i> 3 <i>d.</i>	3 <i>s.</i> 3 <i>d.</i>
Apples, eggs, &c. . . .	1 <i>s.</i> 6 <i>d.</i>	3 <i>s.</i> 6 <i>d.</i>
Luggage, ripe fruit, &c. . . .	2 <i>s.</i>	4 <i>s.</i>
Light goods, game, &c. . . .	3 <i>s.</i>	5 <i>s.</i>
Small parcels under 15lbs. (15 to 112lbs. as 1 cwt.) each . . .	1 <i>s.</i> 3 <i>d.</i>	2 <i>s.</i>

N. B.—No charge for portorage and delivery in London, &c.

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That, under colour of the said agreement, previous to the commencement of the action already mentioned, the defendants charged the plaintiffs and all other persons, for the carriage of goods carried by the Company to and from the terminus at Camden Town, after a higher rate than they charged to Messrs. Chaplin & Horne; and that, until very lately, they charged the plaintiffs after the rates set forth in the printed bills, although plaintiffs bore all the expense of conveying the same to and from Camden Town; but they had since offered to make an insufficient allowance, and, in consequence thereof, plaintiffs brought an action on the case in the Court of Exchequer (*a*).

That, although the unlawfulness of the practices and proceedings of the Grand Junction Railway Company had been established by the said action, and judgment recovered, the Company still persisted therein and in other unlawful practices.

That Messrs. Pickford & Co. wrote several letters to the directors of the Railway Company, requesting them to give them the same accommodation which the London and Birmingham Company gave to all traders; and, in a subsequent letter, they expressed their willingness to pay for packages of small parcels delivered in Birmingham or Liverpool at the rate chargeable upon the highest class of goods they might contain, and requested to be informed what allowance the Company would make for their collecting and loading upon trucks, both at Liverpool and Camden Town, goods for conveyance between Liverpool and London. The Railway Company, in answer to such request, expressed their determination to be carriers on the Grand Junction line and to London; and stated, that the only allowance they could make from the charge made to the public would be the sum paid to the Liverpool and Manchester Company at Liverpool, and 2s. for cartage at Birmingham; and, in respect to London traffic, they proposed to allow, in addition to the sum they

(*a*) The proceedings in this Court are fully reported, *anté*, p. 193.

paid the Liverpool and Manchester Company, 6*s.* per ton for the expense saved by the delivery at their terminus, Camden Town, instead of in London.

That, shortly before December, 1842, the Grand Junction Railway Company advertised that they were carriers of goods between Worcester and the North of England, and published the rates of charges at which they were willing to convey such goods; and, since that time, that Railway Company, acting in connexion with Messrs. Southern & Son, had carried, and continued to carry, goods for hire between Worcester and Liverpool and the North of England; and that the Company had entered into an agreement with Messrs. Southern & Co. for the carriage of goods for the Company between Birmingham and Worcester and neighbouring places, under which Messrs. Southern & Co. took charge of goods between the terminus at Birmingham and Worcester and the neighbouring places.

The Railway Company published a list of their rates of charges for goods:—the first class, 27*s.* 6*d.* per ton; second class, 40*s.* per ton; third class, 80*s.* per ton; and therein stated, that an allowance would be made to parties having more than one ton of goods in one class at one time of 2*s.* 6*d.* per ton.

That the Grand Junction Railway Company charged to plaintiffs, for the conveyance of goods along the said railway to and from the terminus at Birmingham, a much higher rate than the Company charged to Messrs. Southern & Son; and, with respect to many kinds of goods, the charge made by the Company for the carriage for the whole distance from Liverpool to Worcester, including delivery there, was the same as the charge made by the Company to plaintiffs for the carriage of the same goods from Liverpool to the terminus of the Grand Junction Railway Company at Birmingham; and, with respect to some kinds of goods, the charge made by the Company for the carriage

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from Liverpool to Worcester, including delivery there, was less than the charge made to plaintiffs for the carriage of the same goods between Liverpool and the terminus at Birmingham; save only that the said Company made an allowance to plaintiffs, after the rate of 2*s.* per ton, on goods taken charge of by plaintiffs at the terminus of the Railway at Birmingham, being the estimated average cost of delivering such goods in Birmingham.

That such goods could not be carried by plaintiffs from the terminus at Birmingham to Worcester (thirty miles) under 7*s.* 6*d.* per ton.

On the 6th of February, 1843, plaintiffs wrote to Mr. Huish, (the secretary of the Company), proposing to commence forwarding packed small parcels over the Grand Junction Railway, paying for each package at the rate of 10 per cent. more than would be charged if the goods were *bonâ fide* a single package.

That the offer by the plaintiffs of 10 per cent. was made, by way of compensation, to meet the liability to separate actions, which the Court of Exchequer intimated the Grand Junction Railway Company might be subject to, in the case of small parcels consigned to different persons.

To this proposal of the Company, Mr. Huish, by letter, stated, that the then highest rate of the Company for packed small parcels of the usual kind was 4*s.* per cwt., with an option to the sender to pay in lieu thereof the ordinary price per parcel.

That the last-mentioned rates were unreasonable and unlawful, and greatly exceeded the rates charged by the Company for the carriage of any kind of goods between Birmingham and Liverpool, and would in every instance exceed the rates payable to the Company in case all the contents of such package belonged and were consigned to, or intended for one person.

That plaintiffs delivered to the agents of the defendants in Birmingham a hamper, containing divers small parcels,

weighing 9 cwt. 1 qr. 4 lbs., to be carried by the said Company to Liverpool, for which the Company demanded and received payment, 1*l.* 1*s.* 6*d.*

That such charge was unreasonable and unlawful, for that such hamper contained goods chargeable after different rates; and, if the whole of such goods had been charged according to the highest of such rates, and the addition of 10 per cent. made thereto, the carriage would have amounted to 1*l.* 0*s.* 6*d.*, and no more.

That, on the 8th March, 1843, plaintiffs required the defendants to carry thirty sacks of seeds, weighing 43 cwt. 1 qr. 15 lbs., intended for Worcester, but which plaintiffs informed the Company their agent would receive at the terminus at Birmingham; and plaintiffs tendered for the carriage of such goods, 17*s.* 6*d.* per ton, being 25*s.* per ton, the usual rate for similar goods, less 7*s.* 6*d.*, as the allowance for the delivery at the terminus instead of at Worcester.

That the Company refused to receive the seeds unless 25*s.* per ton were paid for the carriage thereof.

The affidavit also stated many similar rates of charge. By letter of the 18th March, in answer to one sent by the plaintiffs, the defendants stated, that a quarterly drawback on Worcester goods was returned to Messrs. Southern & Co., on condition that they gave them all their Worcester goods between Birmingham and Liverpool, and paid for all weights under 112 lbs. as a hundred weight; that they received the goods at the canal wharf by boat; and that on certain goods they paid more than if the same goods were conveyed to Birmingham only. And, by the same letter, it was stated, that the allowance off London rates in certain cases would be 7*s.* instead of 6*s.*

That the rates charged by the Grand Junction Railway Company for the carriage between Liverpool and Birmingham of goods passing between Liverpool and London, were unlawful, for that the London and Birmingham Railway Company made certain fixed charges of tonnage

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to all persons; and that the charge made by the Grand Junction Railway Company for the carriage of goods between Liverpool and Birmingham exceeded the charge made by them for the carriage thereof between Liverpool and London, after deducting the charges paid to the London and Birmingham Railway Company.

That plaintiffs were willing to perform the same duties and services, in respect of goods carried by the Grand Junction Railway Company to and from Camden Town, as were performed by Messrs. Chaplin & Horne, upon receiving the like allowance in respect thereof.

The affidavit filed on behalf of the Railway Company in answer stated, among other things, that, before the opening of the line of railway from Birmingham to London, the Grand Junction Railway Company carried goods only upon the Grand Junction Railway between Birmingham and Lancashire; and that they carried goods at very much lower rates than used to be charged by the plaintiffs and other common carriers.

That B., one of the plaintiffs, was appointed by the directors of the London and Birmingham Railway to manage the goods department thereof, that railway declining to be carriers.

That several carriers, established on the London and Birmingham lines, applied to the defendants to allow them as carriers to use the Grand Junction Railway; and an agreement was entered into accordingly, whereby abatements from the prices charged to the public were made to the carriers, partly in consideration of the duties they undertook to perform, and partly in consideration of their bringing their traffic.

That the Grand Junction Railway determined the agreement in two years, because it was used as a means for taxing the public excessively for the carriage of goods over the London and Birmingham Railway; and also because the high rates levied by the carriers on the London and

Birmingham traffic deterred the senders of goods from Lancashire to London from using the railway.

That, between Birmingham and Lancashire, the carriers were prevented from making excessive charges, because the defendants were themselves carriers.

That, in June, 1840, the Grand Junction Railway Company became carriers, over the London and Birmingham line, of London and Lancashire goods.

That the effect of this was to reduce the charges on the part of the carriers from 110*s.* and 112*s.* per ton to 65*s.* and 70*s.* per ton.

That the plaintiffs employed the Grand Junction Railway Company to carry for them only between Liverpool and Birmingham; and that there was no identity or similarity of circumstances between the cases of the goods carried by the defendants from Lancashire to London, and vice versa, and the goods carried for the plaintiffs only between Liverpool and Birmingham.

That, when the defendants determined to become carriers between Lancashire and London, they agreed to employ Messrs. Chaplin & Horne as their agents, to manage their business in London, and to collect and deliver goods; for which services they agreed to pay Messrs. Chaplin & Horne 10*s.* per ton, which agreement existed until the judgment of the Court of Exchequer, when both parties agreed to determine the same.

That, by an agreement entered into between the parties, an annual salary was allowed to Messrs. Chaplin & Horne as a remuneration for their services, which salary was paid as to the other clerks and agents of the Company; and that, independently of the said salary, the Company agreed to allow Messrs. Chaplin & Horne 7*s.* per ton on all goods collected and delivered by them in all parts of London, other than at the terminus of the London and Birmingham Railway at Camden Town.

That the duties and services in respect of which the said

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salary was paid were entirely distinct and different from the collecting and delivery.

That Messrs. Chaplin & Horne were never carriers of goods between London and Liverpool, and never had any interest in the conveyance of goods between those places, except as agents of the defendants.

That the allowance offered by the Company to the plaintiffs of 7*s.* per ton, in respect of the collecting and delivery of goods in London from Camden Town, was by them considered insufficient; but that they had long accepted, without objection, for the same thing in Birmingham 2*s.* only.

That the charge of 4*s.* per cwt., with an option to the sender to pay for each parcel separately, was greater than the sum charged for some goods, but less than the Company would charge for bullion and other valuable and perishable articles, and therefore on the whole fair and reasonable.

That the Grand Junction Railway Company never were carriers of goods between Worcester and the North of England, nor ever notified to the public any rates of charge at which they were willing to convey such goods, nor had Messrs. Southern & Son, in connexion with the said Company, carried goods between such places; and that no arrangement existed between the parties for the carriage of goods between Worcester and the North of England.

That, it having been represented to the defendants that a portion of the traffic between Liverpool and Worcester might be carried along the railway, if an arrangement could be made by which the charges for goods carried between Liverpool and Birmingham could be reduced, their charges on other kinds of goods being increased, the Company agreed to make an alteration in their rates in respect of goods *bonâ fide* carried between Liverpool and Worcester.

That Messrs. Southern & Son took advantage of these terms, and the Company carried goods between Liverpool and Birmingham, which were conveyed between Birming-

ham and Worcester by Messrs. Southern & Co., and that the Company were willing and desirous to carry for the plaintiffs on the same terms and conditions in all respects as for Messrs. Southern & Co., and to make the same drawback and allowance upon having the same equivalents.

The Company denied that the charges made and demanded by the Grand Junction Railway Company between Liverpool and Birmingham did, in fact, exceed at all, on the average, the charges made by them between Liverpool and London, after deducting the charges paid to the London and Birmingham Railway Company for tonnage and locomotive power, and the expenses of collection and delivery of the goods in London.

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Mr. *Stuart*, Mr. *Parker*, and Mr. *Cardwell*, for the appellants.

The act of Parliament enacts two things on which this application is grounded: first, that the rates shall be equal along the whole line of railway; and, secondly, that the charge shall be reasonable. The Court of Exchequer (a) has decided these two points in favour of the appellants, but in neither of them have the defendants complied with the judgment of the Court of law.

The tonnage from Birmingham to London charged by the defendants for the carriage of Irish linen is 23*s.* 4*d.* per ton; for locomotive power, 6*s.*; and for other incidental expenses, 10*s.*: these sums added together make 39*s.* 4*d.*; that is, from Birmingham to London. Now, deducting 39*s.* 4*d.* from 60*s.* per ton, which is the rate all the way to Liverpool, 20*s.* and 8*d.* is left as the rate from Liverpool to Birmingham, whereas the charge made is 25*s.*, if the appellant take his goods at Birmingham. This is neither equal nor reasonable. In the same manner, cal-

(a) *Antè*, p. 193.

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culating the proper charges on cotton and wool, the charge is 20*s.* per ton; and on sugar 25*s.* per ton instead of 15*s.* 4*d.*

With respect to the small parcels, the evidence shews, that, after the decision in favour of the appellant in the Court of Exchequer, repeated instances occurred of the defendants making the same charges as by that Court were declared to be illegal. Now if, pending a litigation or after a legal right is established, there can be shewn one instance of illegal charge, plaintiffs are entitled to an injunction.

The acts of Parliament contain a contract between the Grand Junction Railway Company and the Legislature on behalf of the public; and the judgment of Lord *Eldon* in *Blakemore v. The Glamorganshire Canal Company* (a) shews the manner in which these acts are to be considered. Are parties to have no redress, except by bringing action upon action for each violation of their rights? No number of actions at law can possibly secure to the plaintiffs their rights. They would have to bring a separate action, or to have a separate count in their declaration, for every separate package which they, as carriers, consign to the Company; and from the moment the writ is taken out, the door is closed against them, and they must commence de novo for each cause of injury that accrues subsequently. In the cases of patentees and of authors, they may bring actions at law in case of a violation of their rights; but a greater relief is granted by this Court; for a Court of equity will quiet them in the possession of the very right which the law has given them. In the case of a right of way, this Court will grant an injunction in order to quiet the possession, notwithstanding an action may lie at law for the obstruction. The Bank of England has an exclusive privilege, and although it had the power of bringing an action

(a) 1 My. & K. 154.

for each bill accepted by bankers in London in contravention of their privilege, yet they have the power to file, and have filed bills in this Court, and obtained injunctions, which have been continued by the decision of the House of Lords: *Bank of England v. Anderson* (a).

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The decision of the Vice-Chancellor of England, from which the plaintiffs are now appealing, was given solely on the ground of delay; but it is contended, that this case cannot be prejudiced by delay as long as the legal right endures. In some cases delay is a waiver and a destruction of the legal right; but here the legal right is just in as full force at this moment as it was immediately after the decision of the Court of Exchequer. No length of time will prevent any one of the public from coming to a Court of equity to restrain a practice which he can shew to be illegal. There has been no acquiescence on the part of the plaintiffs; for the correspondence between the plaintiffs and defendants only ceased in March, up to which time protests were continually from time to time made against the rates of charge.

Mr. *Bethell* and Mr. *S. B. Follett*, for the Railway Company.

— The plaintiffs come to this Court, having purely and simply a legal right of action given them by act of Parliament; they rely on the decision in one action at law, and on an allegation that the practices therein complained of are continued: instead of bringing another action, they come to this Court for an injunction. This Court cannot be substituted for the ordinary legal tribunal to try what is purely a legal right. The only instances in which this Court interferes are, first, in the case of real property, when this Court prevents an individual from being har-

(a) 2 Keen, 328.

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rassed by repeated actions of ejectment after one founded on the same title has failed ; and the other is in the case of a bankrupt, who will be restrained by this Court from contesting the validity of his commission after the same has been once established : but neither of these cases justifies the interference of this Court in this case. This is not the case of an injunction sought to protect the enjoyment of things granted by the Crown, such as copyrights and patents.

The interposition of the Court is not granted to prevent numerous actions by the same individual ; but when there is a right which is participated by several persons, the Court will interfere to ascertain the extent of that right. Such is the common right claimed by all the copyholders of a manor ; a right of way or right of ferry claimed by all the inhabitants of a parish. But these cases bear no analogy to that of an individual, who, having brought an action for a particular injury done to himself, comes to this Court for further relief: Eden on Injunctions, p. 356; Mitford's Chancery Pleadings, p. 116. This is not a bill on which plaintiffs can apply for an interlocutory injunction ; such a bill must be founded on waste or irreparable damage, and in order to preserve property, and protect it until the trial of the cause. But this motion is in fact made to obtain a perpetual injunction which, we contend, can only be granted by decree ; for it is an anomaly to try to obtain that upon an interlocutory application which is the sole end and object of the cause itself.

This application has destroyed itself by delay : *Semple v. The London and Birmingham Railway* (a). Another ground of objection is, that this notice of motion does not define with clearness what is to be done, or what the defendants are to refrain from doing. To grant an injunction in the terms

(a) *Anté*, Vol. 1, pp. 120, 480.

here asked, would be a mere trap and a snare for the defendants, as it would not determine nor prescribe anything, but in fact only occasion a fresh cause for argument. The only effect would be, that the question of interpretation would be transferred from the statute to the injunction: *The Earl of Ripon v. Herbert (a)*. The acts passed in the reign of Will. IV are not applicable to this case, for they were passed when the Grand Junction Railway were not carriers. Then, the 26th section (b) of the 3 Vict. c. xlix, requires an equality in two distinct cases. The goods must pass over *the same portion* of the line, and under *the same circumstances*. The case of overcharge cited by the appellants does not come within these terms. It cannot be determined what is the proper rate of charge from A to B by stating what is the rate of charge from A to (B+C), and by deducting therefrom the charge from B to C: *Attorney-General v. The Brandling and Derby Junction Railway Company (c)*. No question can now, or at the hearing of the cause, be raised as to the validity of the new agreement now existing between the Railway Company and Messrs. Chaplin & Horne, for that agreement, which existed at the time of the filing of the bill, is not stated in it, and therefore cannot be the subject of an interlocutory order or of a decree.

[The facts, as stated on the affidavits filed by the Company, were relied on as to the points made by the appellants with respect to the difference of charge made to Messrs. Southern & Co., and with respect to the unreasonableness of the charges made for "smalls." It was also contended, that the reduction which had been made, from 9s. to 4s., since the decision of the Court of Exchequer, entirely brought the charge within the terms "moderate" and "reasonable;" and also, that the appellants must ob-

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(a) 3 My. & K. 169.

(b) See *antè*, p. 210.

(c) *Antè*, Vol. 2, p. 124.

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tain a decision of a Court of law on this subject before they could apply for an injunction in a Court of equity.]

Mr. *Stuart*, in reply, cited *Martin v. Mitkin* (a) and *Barrett v. The Stockton and Darlington Railway Company* (b).

The LORD CHANCELLOR proceeded to give judgment in this case.—The bill in this case prayed for a declaration as to the rights of the plaintiffs, and that the defendants might be restrained from making certain charges as carriers by railway which the plaintiffs considered to be illegal. Immediately after the filing of the bill, the plaintiffs gave notice of motion for an injunction. The affidavits in support of this motion were filed on the 23rd of June, and the affidavits in answer on the 15th July. Further affidavits were afterwards filed on both sides, but the affidavits principally relied on were those first filed by the plaintiffs, and those in answer by the defendants. The case was not brought on till the end of the following month of January, although the Vice-Chancellor stated that he would, as a matter of course, have heard it in the Long Vacation, on a proper application for that purpose. It was argued for three days by the plaintiffs' counsel, and then stood over. The motion was not brought on again till the 29th of June. The plaintiffs' counsel were again heard, when the Vice-Chancellor gave his opinion, that, after such delay, the plaintiffs were not entitled to the injunction; and he refused the motion, with costs. The present application is to discharge that order.

Where a party files a bill praying for an injunction, and afterwards moves on affidavit for an immediate injunction, that can only be granted on the ground, that to wait for the decree would be productive of great or unknown mischief to the plaintiffs. If the complain-

(a) 2 P. Wms. 266.

(b) *Antè*, Vol. 2, p. 443.

ant makes his application to the Court, and allows it to slumber, the reasonable conclusion is, that he does not consider the case to be of an urgent nature; and the Court will not interpose in his favour when he shews by his own conduct that he does not consider such interference to be imperative. In this case, a twelvemonth was allowed to elapse between the giving the notice of motion and its coming on for a final hearing; and no serious attempt was made to bring it on to an earlier conclusion. The plaintiffs having by their supineness allowed so long a time to intervene without bringing the motion to a conclusion, there is no reason why the Court should interfere before the hearing of the cause. I think, therefore, the Vice-Chancellor was justified in refusing the motion.

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It may not be immaterial to observe, that, according to the decision of the Court of Common Pleas, in the case of *Parker v. The Great Western Railway Company (a)*, if the plaintiffs are compelled, in order to carry on their business as carriers, to make payments to the Railway Company which shall afterwards be adjudged to be illegal, they may recover such over-payments from the Company in an action for money had and received; and it is a part of the prayer of the present bill, that an account may be taken of the rates unlawfully demanded.

But, independently of this consideration, I should have great difficulty on the merits, as far as they can be ascertained from the voluminous affidavits that have been filed in this case, in determining that an injunction ought to be granted. The objections insisted on by the plaintiffs are four in number. I will consider, first, that which relates to Messrs. Chaplin & Horne. It is sworn, on the part of the defendants, that, immediately after the judgment delivered in the Court of Exchequer, the agreement with

(a) Post, p. 563.

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Messrs. Chaplin & Horne was put an end to, and a new arrangement made, which, they submit, is free from objection. The carriage of goods to the terminus at Camden Town, as they represent, is performed by the Company solely on their own account. Chaplin & Horne have no interest in it. The charge to the plaintiffs is the same as to the rest of the public; they allow 7*s.* a ton to Chaplin & Horne for delivering and collecting, which they contend is a fair price; and for the other duties which they perform as their agents they are paid by a salary. They further state, that they make the same allowance of 7*s.* a ton to all the persons who receive their goods at the terminus, or bring them there, and that they are willing, and have offered to make the same allowance to plaintiffs. If this is a *bonâ fide* arrangement, it seems free from any legal objection. It is suggested, indeed, that it is colourable, that the charge is merely nominal, and contrived for the purpose of avoiding the decision of the Court of Exchequer. There is not, I think, sufficient in these affidavits to make out such a case, although, perhaps, there may be some ground for suspicion.

Another objection arises out of that part of the case which relates to the carriage of small parcels. The defendants charged 4*s.* per cwt., giving an option to the employer to pay, if he think proper, according to the charge for the parcels separately. The plaintiffs contend that this is illegal, and that it has been so decided by the Court of Exchequer (a); and they claim, therefore, the interposition and assistance of this Court to prevent the continuance of the abuse. The Court of Exchequer did not decide what was the reasonable sum to be paid in cases of this sort. They stated, they were relieved from the necessity of doing so by the admissions in the special case. Whether 4*s.* a cwt. is a reasonable charge, has never been expressly

(a) *Antè*, p. 193.

determined. In estimating the reasonableness of the charge, several points were required to be considered: the inspection of each of the packages would be absolutely impossible. It seems to follow, therefore, that, for the purpose of guarding against fraud, some average amount must be established. The highest rate of charge for articles contained in the published list is 3*s.* per cwt., but, for several articles not enumerated in that paper, a further sum, the defendants say, is required. If it be lawful, then, to charge in cases of this sort according to an average, (and I do not at present see any reason against it), the question as to what would be the reasonable amount of that average is still to be decided. But an option is given to the party to pay the 4*s.* per cwt., or to pay for the parcels separately. To require them to pay for the separate parcels would, according to the decision of the Court of Exchequer, be illegal; but that is not required—an option is given; and, although the scale may in some cases be less than 4*s.* a cwt., yet in others it would be considerably more. If the principle, therefore, of an average be legal, and 4*s.* be a reasonable amount of that average, the alternative offered to the owners of the goods would not render the charge illegal. It is not improbable, advertng to what fell from the learned Baron in giving the judgment of the Court, that, if the point had been before him for decision, he might have considered 4*s.* as an unreasonable charge; but the question still remains for the decision of a jury, acting, indeed, under the guidance of a Judge; and independently, therefore, of the ground taken by the Vice-Chancellor, I think I ought not, in this state of the case, to grant the injunction on this ground.

Another ground of complaint is, that more in proportion is charged when goods are carried over part of the line than when goods are carried the whole distance to the terminus. This is founded on certain calculations as to the charges made by the London and Birmingham Railway

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Company, which are stated on the other side to be incorrect. In the affidavit of Mr. Huish, the mode of charge is described; and it is sworn, that, having regard to that mode of charge, the sum charged in respect of the short distance does not exceed the fair proportion.

The remaining question relates to the carriage of goods from Liverpool to Worcester. The complaint is, that the same charge is made for goods delivered at the Birmingham terminus as for goods carried on and delivered at Worcester. The case of the defendants, as they state it, appears to be this: they are carriers only to Birmingham—they deliver the goods there—they make the same charge in this respect to all their customers; but they admit, that, in consideration of Southern & Co. agreeing to give them their whole custom, and agreeing to pay, on certain articles, an increased price, they make a quarterly deduction from their accounts. They offer the same terms to the plaintiffs, and they say this species of arrangement is usual with Railway Companies.

Whether such a principle can be maintained may be open to much question; but, as neither in this nor in the preceding case has a Court of law declared the proceedings of the defendants to be illegal, I think it would be impossible to grant the injunction; for, as was justly observed by Lord Cottenham in the case of *Semple v. The London and Birmingham Railway Company* (a), the Court exercises this jurisdiction for the purpose of giving effect to a legal right, after that legal right has been established. I am of opinion, therefore, that the appeal motion must be refused, and with costs (b).

(a) *Ante*, vol. 1, p. 120.

(b) See the next case.

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ASSUMPSIT to recover 1000*l.* as money had and received by the defendants to the use of the plaintiff. Plea, By a railway act, 5 & 6 Will. 4, c. cvii, s. 163, it is en-

acted, that all persons shall have free liberty to pass along and use the railway with carriages upon payment of certain rates and tolls. By s. 166, the Company are empowered to provide locomotive or other propelling power, and to charge for the use thereof certain additional rates. Sect. 167 authorises the Company to carry and convey on the railway, passengers, cattle, and goods, and to make reasonable charges for such conveyance, in addition to the rates or tolls by the act authorised. Sect. 174 empowers them from time to time to reduce any of the said rates or tolls, and again to raise them, so as not to exceed the amount authorised by the act; and sect. 175 provides that the aforesaid rates and tolls shall at all times be charged equally and after the same rate per ton per mile throughout the whole of the railway, in respect of the same description of articles, matters, or things; and that no reduction or advance in the said rates or tolls shall, either directly or indirectly, be made partially, or in favour of or against any particular person or Company, or be confined to any particular part of the railway, but shall extend to the whole of the railway, and to all persons whosoever using the same or carrying the same description of articles &c. thereon. By a subsequent act, 2 Vict. c. xxvii, a similar provision is made for charges by the said acts authorised to be made for the carriage of passengers, goods, &c., to be conveyed by the Company, or for power and carriages supplied by them.

The Company acted themselves as carriers, charging the public at the rates specified in their printed bills for carriage, including the collection, weighing, loading, unloading, and delivery of the goods. They also carried goods for other carriers, allowing them a certain deduction for the trouble of collection, &c., which was performed by the carriers. In their dealings with a particular carrier, they refused to make such allowance, but were willing to perform for him all the things which formed the consideration for that allowance, and which, in fact, he performed for himself.

Held, that the Company were not justified in withholding the allowance from such carrier, and, therefore, that the charges to him were not equal or reasonable.

The Company made the following distinction, as to charges for carriage, in their dealings with the public and with carriers. In the case of the public, if there were several packages from one consignor to several consignees, or vice versa, the charge was made upon the aggregate weight: in the case of carriers, if there were several packages consigned by or to different individuals, the charge was upon the separate weight of each package, unless it was known that more than one package belonged to the same sender, or was going to the same consignee, in which case they were charged on the aggregate weight. In all cases of carriers, the Company dealt with and recognised the carriers only as their consignor and consignee of the goods.

Held, that they were bound to treat them so for all purposes, including the mode of charging in the aggregate, and had no right to make a distinction in that respect between them and individuals.

Held, also, that the extra charges which were paid by the plaintiff in both instances might be recovered back in an action for money had and received, being payments not made voluntarily, but in order to induce the Company to do that which they were bound to do without them.

Such acts of Parliament are to be construed strictly against the parties obtaining them, and liberally in favour of the public.

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non-assumpsit. A verdict was taken for the plaintiff, by consent, damages 823*l.* 19*s.* 3*d.*, subject to the opinion of the Court upon the following case:—

The plaintiff is an extensive carrier, having his London establishment in New Inn Yard, Old Bailey, and his several other establishments at, near, or within twenty-two miles of the various stations on the Great Western Railway. The defendants are the Great Western Railway Company mentioned in and incorporated by the statute 5 & 6 Will. 4, c. cvii, for making a railway from Bristol to join the London and Birmingham Railway near London, to be called "The Great Western Railway," with branches therefrom to the towns of Bradford and Trowbridge, in the county of Wilts, and mentioned in the several subsequent acts of Parliament relating to the Great Western Railway, viz. the 6 Will. 4, c. xxxviii, the 1 Vict. cc. xci, xcii, and the 2 Vict. c. xxvii, all of which were to be referred to as part of the case.

The said Company some years past completed the whole line of railway mentioned in their acts of Parliament, and have, from the time of the completion of the said railway to the present time, not only carried passengers thereon, but have also during all that time been common carriers thereon of cattle, goods, and merchandize of all kinds from Paddington to Bristol and vice versâ, as also from and to all the intermediate railway stations, including the several intermediate railway stations or places hereinafter mentioned, making certain rates or charges for the carriage and conveyance of such things as aforesaid.

The Company have ever since the opening of their said railway been the only carriers upon the same, and have always supplied both the carriages in which persons and things have been carried, and also the locomotive engines whereby such carriages with their contents have been moved along the said railway, and have always conducted

and managed such engines and carriages by their own servants. No person other than the Company has ever had any locomotive engines or other moving power in operation on the said railway, nor any carriages or vehicles for the conveyance of goods or passengers; nor has any other person ever conducted or driven any engine or carriage upon the said railway.

The Company have ever since the opening of their said railway been in the habit, as common carriers, of carrying goods thereon to and from the different railway stations, not only for the public at large, by which is meant persons not themselves in the carrying trade, but also for persons being (like the plaintiff) carriers by trade themselves: and all the goods hereinafter mentioned to have been carried by the Company for the plaintiff were carried by them as such common carriers on their said railway.

The Company, from 1841 to the present time, when employed to carry goods on their railway for the public at large, have always by their own servants performed the loading and unloading of the goods for the public, without making any extra charge for the same beyond the charge for carriage. By the loading and unloading of the goods is meant the unloading them from any vehicle in which they may be brought to the Company's respective stations, and the loading them on the Company's trucks in which they are conveyed on the said railway; also the unloading of the goods from off the trucks when arrived at the station of delivery or journey's end on the railway, and the reloading of them upon any vehicle waiting or coming there to carry the same away.

The Company and the carriers have always, during the times aforesaid, when the former have been employed to carry goods for the latter, proceeded as follows:—The carriers have done the above loading and unloading by their own servants, with the assistance of the Company's servants; and accordingly the plaintiff, as a carrier, in com-

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mon with the rest of the carriers for whom the Company have carried goods, has on every occasion during the times aforesaid, when the Company have carried goods for him on their railway, performed the loading and unloading of the goods by his own servants and those of the Company as aforesaid; and, in order to be able to assist in such loading and unloading at the several stations on the railway to and on which the plaintiff and the other carriers have during the times aforesaid been in the habit of sending goods by the said railway, the plaintiff and the other carriers during the times aforesaid have been obliged to keep and have separate establishments of clerks and servants at each of such stations, viz., in the plaintiff's case, at the several stations at Paddington, Steventon, Cirencester, Bristol, Bath, and Farringdon Road, each of which establishments of servants and clerks has been of considerable and constant expense to the plaintiff and other carriers as aforesaid. At Reading, the plaintiff has employed an agent called James Honey, whom he paid according to the amount of business done by him, and who employed, when necessary, sub-agents. Honey's whole time is not occupied in transacting the plaintiff's business.

The collection and delivery in London and the towns on the line of railway of small packages, that is to say, of packages under 2 cwt., has been conducted as follows:— By "collection" is meant this, that, the Company's stations being generally situate in the outskirts of the towns on the line of railway, it becomes necessary to collect the goods in the towns and carry them by some conveyance to the Company's stations in the outskirts before they can be conveyed on the railway. Thus, the Company's station at Paddington being nearly four or five miles from the central parts of London, collection in London consists in sending carts and men round to various parts of London, and then taking up any packages of goods required to be carried by the Company, and so carrying the said goods from the

places where taken up through the public streets to the Company's railway station at Paddington; and the like at the other towns on their line of railway. By "delivery" is meant, when packages have arrived at their journey's end on the railway, the taking of them in carts and wagons or other vehicles from the railway station through the public streets to the places to which the same may be addressed in the town adjoining such railway station, and there delivering them.

From the year 1841 to the present time, the Company, when carrying goods for the public at large, not carriers, have performed the collection and delivery, and made no charge in respect of collection or delivery in addition to their ordinary charge for carriage as set forth in their printed bills, provided the packages so carried did not exceed 2 cwt. each: if above 2 cwt. each, the Company have made an extra charge for such collection and delivery.

The Company, for the purpose of performing the collection and delivery of such goods as the public required them to collect and deliver during the period in question in this case, employed one Sherman, himself a common carrier, to do that service, with his servants, horses, and carts, and paid him large sums of money for the collection and delivery of parcels.

During all the said period, the Company and carriers, when the latter have employed the former to carry goods for them, have proceeded as follows:—The carriers (and the plaintiff among them) have done by their own horses, servants, and vehicles, the collection and delivery of such goods, of whatsoever weight the packages might be.

It is to be observed that the carriage of packages of and under 2 cwt. forms the most lucrative part of the business of a carrier: such packages are far more numerous than those of a greater weight.

When goods are brought to the Company's station to be carried by them, it is necessary, in order to ascertain the

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amount to be charged by the Company for carriage, that the weight of the goods should be ascertained; and, when *the public* have brought goods to their stations to be carried, the Company have always by their own servants done, or been ready and willing to do the weighing of the goods for the public, free of any charge in addition to the ordinary charge for carriage, so as to ascertain the amount payable for carriage; but the *carriers* who have brought goods to the Company's stations to be carried by the Company, and the plaintiff as one of them, always have done the weighing of the goods by their own respective servants and at their own expense, and at their own respective warehouses or places, and not at the Company's stations or with the Company's scales, although the Company have always been prepared with the means of checking such weights by their own scales and servants, where the correctness of them was doubted: and by this means the Company have been saved considerable additional expense and trouble, which would have been requisite if the Company had had to weigh the goods brought by the carriers.

When goods carried on the railway by the Company have arrived at the end of the journey on the railway, the Company, during the period in question in this action, have been in the habit of allowing the goods, if carried for the public at large, to be warehoused free of charge for two days, and in some cases several weeks, in the Company's premises at the station of arrival, until the consignee found it convenient to take them away; but, when the goods carried by the Company have been so carried by them for carriers (for instance, for the plaintiff), the Company have refused to allow them or him to warehouse the same in the Company's premises for any time at all.

The Company have always been the sole carriers on the railway; and all the trucks, carriages, and locomotive engines employed thereon have always belonged to them, and been worked, moved, and conducted by their servants; so

that the Company have never made one rate, toll, or charge to the public, or to the carriers, for the use of the railway; and another rate, toll, or charge for the use of locomotive engines or power, nor any separate rate for the conveyance of goods on the railway by the Company in addition to the two last-mentioned rates; but the Company have always charged the public and the carriers one single rate or charge.

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The charges made by the Company for the carriage of goods on the railway have been governed by printed bills and a scale-book issued and published by the Company from time to time. [The printed bills and scale-book marked respectively A., B., C., D., E., F., G., and H., and signed by the respective attornies, were to be referred to as if set out in the case.] The said bills were issued at the following periods, that is to say, the bill marked A., at the opening of the railway to Farringdon Road; the bill marked B., on the 16th of December, 1840; the bill marked C., on the 31st of May, 1841; the bill marked D., on the 30th of June, 1841; the bill marked E., on the 1st of November, 1841; the bill marked F., on the 1st of November, 1842; and the bill marked G., on the 1st of March, 1843. Each of the said bills was in force from the time of its issuing till the period when the next succeeding one is above stated to have issued, and bill G. till the commencement of this suit. The said scale-book marked H. was issued in May, 1841, and remained in force from that time till the commencement of this action.

The Company have during the time in question in this action allowed the carriers on all goods carried by the Company on their railway for the carriers a deduction or discount, equivalent to 10 per cent., from the rates charged to the public as set down in the said bills and scale-book; such deduction being made at the time when the carrier paid the Company for the carriage of the goods. This discount or deduction of 10 per cent. on the Company's rate

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of charge to the public has been allowed by the Company to all carriers who have employed the Company to carry goods on the railway, and who have not been charged by the Company with concealing or making false declarations as to the contents of packages transmitted by the railway, or otherwise infringing the regulations of the Company.

It is admitted that the loading and unloading and weighing, and the preparation of the ticking-off notes and carrier's declaration ticket hereinafter mentioned, are a reasonable equivalent for the allowance of 10 per cent.

The Company's practice appears to have been, to compensate the carriers for damage occasioned by the improper stowage of their goods with those of other people, but not for damage occasioned by the improper stowage of the carriers' own goods *inter se*. The sum of 80s. appears to have been paid to the plaintiff for damage by improper stowage during the time in question in this suit.

The Company, until May, 1841, allowed the carriers to send by the railway small parcels and packages of any weight, of goods of one and the same class (the 5th class, for instance), at the same rate per ton, or for less than a ton, as the heavy or large packages: the public during the same period were charged as stated in the bills marked A. and B. as follows, that is to say, "An extra charge per ton is made for small quantities of goods, of which particulars may be had on application." The above sentence applied to packages of less than a ton. By reason of the above privileges, the plaintiff and the other carriers were enabled to charge the public as low as or lower than the Company for the carriage of goods by the railway, and still to get a profit.

On the 31st of May, 1841, the Company issued the bill of charges marked C., for the carriage of goods; and from that day until the 30th of June following the carriers were placed by the Company on the same footing as the public in respect of the Company's charges for the carriage of small parcels and packages not exceeding 2 cwt.

The Company, on the 30th of June, 1841, issued the bill of charges marked D., in which they stated that an extra charge of 2*d.* per lb. would also be made, in addition to the regular rates of carriage, for the conveyance of all packages of whatever description forwarded to, from, or on account of carriers, inn-keepers, warehousemen, or wharfingers, which might contain separate parcels addressed to or intended for delivery to other persons than the consignee of such packages, where the Company would be deprived of their just and lawful scale of charges by means of such packing together or concealment of small parcels. The Company have repeated the above announcement contained in the said bill marked D. in every subsequent bill of charges published by them, and have acted upon and enforced it from June, 1841, down to the present time, by charging the extra 2*d.* per lb., in addition to the regular rates of carriage, upon all packages carried by the Company on their railway, to, from, or on account of carriers, which have contained separate parcels addressed to or intended for delivery to other persons than the carrier's consignee of such package.

The aforesaid announcement in the said bill of charges marked D. was made and acted on by the Company in consequence of having discovered that there had been a practice by some carriers of packing many small parcels or packages each under 2 cwt. in one hamper or case, and making each of such hampers or cases exceed 2 cwt., and addressing such hamper or case to an agent of the carrier at the terminus of the journey on the railway, to which agent the Company were employed by the carrier to deliver such hamper or case; and such agent, after receiving it, delivered the separate parcels or packages contained in it to the several persons to whom such parcels were directed: thus depriving the Company of their printed scale of charges secondly set forth in the said bill marked C., and bringing

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such parcels within the printed scales respectively applicable to parcels above 2 cwt.

The Company have enforced this extra charge against various carriers upon packages containing separate parcels as aforesaid, in cases in which such package carried on the said railway by the Company for a carrier has been delivered to one person only, namely, to the agent of the carrier, at the station of delivery at the end of the journey. The Company have always refused to recognize any other consignee of such package, or of any parcel therein contained, than such agent of the carrier, or to deliver such package or any part of the contents thereof to any other person than such agent. Such agent has always received the package in bulk from the Company, who have had no further trouble therewith, nor any concern with or part in the distribution of the several packages contained therein to the respective owners thereof.

The Company have never made any such extra charge to persons not being carriers, inn-keepers, warehousemen, or wharfingers.

The public, except carriers, inn-keepers, warehousemen, and wharfingers, have always been allowed to pack small parcels together into one package, and pay on the entire package, without being subject to the extra charge of 2*d.* per lb. above mentioned.

Some of the carriers were detected by the Company in packing small parcels under 2 cwt. into one hamper or package, so as to make it weigh above 2 cwt., with a direction thereon to one consignee, the agent of the carrier, for the purpose of avoiding the said higher rate of charge on packages of and under 2 cwt. The Company refused any longer to deal with such carriers as were detected in doing this, upon the terms of making them the said allowance of 10 per cent. usually made by them to the carriers as above-mentioned; and have, ever since the detection of such prac-

tices, compelled them to pay the full rate of carriage, without such deduction of 10 per cent. as aforesaid. The Company adopted the like course towards certain carriers whom they detected in altering the addresses of packages brought by such carriers to the railway to be carried by the Company, such alteration being made with the view of concealing from the Company the fact that such packages belonged to different owners, in order to avoid the higher rate with which they would otherwise have been charged.

The Company, in June, 1841, consented to allow the carriers, by way of compensation for the collection and delivery as above explained of parcels under 2 cwt., and also for the risk incurred in such collection and delivery, a deduction, from the rates charged by the Company to the public for the carriage, loading and unloading, collection, and delivery of such parcels, of 5*d.* for each package not weighing 1 cwt., and 10*d.* on each package above 1 cwt. and not exceeding 2 cwt. This allowance has accordingly been made by the Company to all carriers on all parcels not exceeding 2 cwt. carried by the Company on their railway for such carriers, with the exceptions hereinafter mentioned, from the month of June, 1841, down to this time; and the mode of making it has been to deduct the amount of such allowance from the amount of charges for carriage of the parcels so allowed for, on paying such charges to the Company, and for the carrier to pay them the balance only remaining after such deduction; such allowance of 5*d.* and 10*d.* respectively being a fair and reasonable allowance for the labour, cost, and risk thereby saved to the Company. The Company did not continue this allowance to those carriers whom they detected in packing together small parcels, or in altering the addresses of packages, in manner and for the purposes above mentioned. Where the Company once discontinued the said allowance of 10 per cent., and of 5*d.* and 10*d.* respectively to any carrier for the above causes, or either of them, they have never afterwards allowed them

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again to such carriers, even though they should never have repeated the act for which the Company visited them with such a deprivation.

There was no by-law of the Company for making or discontinuing the aforesaid allowances. Such allowances or discontinuance were in all cases sanctioned and agreed to by the directors of the Company; and the plaintiff and all the other carriers dealing with the Company had distinct notice that the Company would discontinue such allowance to any carriers detected in packing together small parcels or packages as aforesaid, or altering the proper addresses and consignment of goods, and making a false declaration of their contents.

With regard to the origin of the said allowances of 10 per cent., 10*d.*, and 5*d.*, it appears, that, from the time of the opening of the railway until May, 1841, the carriers had always done the loading and unloading, weighing, and collection and delivery, and the Company had always made the carriers an allowance of a certain amount per ton upon the goods carried by them. In May, 1841, certain carriers applied to the Company for a deduction of 20 per cent. from the charges made to the public, and shortly afterwards the directors of the Company resolved to allow the carriers the above-mentioned 10 per cent., and it has been always since allowed to them. In the month of June, 1841, certain carriers made an application to the Company for further relief; and the directors of the Company shortly afterwards resolved to allow, and have ever since allowed the carriers the deductions of 10*d.* and 5*d.* respectively above mentioned.

In the month of February, 1842, the Company made a further alteration in their system of charging the carriers for the carriage of goods for them on the railway. The alteration consisted in this, that, when one of the public brought several packages of goods, and paid the charges, the Company charged him on the weight of the aggregate,

although they might belong to different consignees; also, if several of the public brought several packages addressed to one consignee, who was to pay the charges, such consignee was also charged upon the weight of the aggregate. But, if a carrier brought several packages consigned by or to different individuals, he was charged upon the separate weight of each, unless it was known that more than one package belonged to the same sender and was going to the same consignee; in which case all belonging to the same sender and going to the same consignee were charged upon the aggregate weight. It is to be observed, that the above system of charging applied to packages sent by the same train, and not exceeding in weight 1 ton each: and, further, that, in all of those of the above cases in which carriers employed the Company and paid their charges as above mentioned, the aggregate of the goods were consigned and to be delivered by the Company to the carrier or his agent, and by such carrier or his agent to the ultimate consignees; and that, in the above cases, the Company dealt with and recognized the carrier only as their consignor and consignee of the goods.

The following letter was written and sent on the date thereof by the Company's superintendent to Messrs. Baiss & Brothers, wholesale druggists in London, who were in the habit of sending goods by the railway:—

“Paddington, 26th February, 1842.

“Gentlemen,—I beg to acknowledge the receipt of your letter of the 25th instant, inquiring certain particulars respecting our mode of charging for goods. In reply, I beg to inclose you one of our books of charges, which are exclusive of a charge of 3*d.* per cwt. for cartage, except where the weight is under 2 cwt., when the price therein stated includes that service.

“As to the goods for the different parties being taken in the aggregate and paid for in one lump, our plan is this;

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the parties who bear one charge are considered to be entitled to the benefit of this 'lumping system:' thus, if, on sending to various people, you pay the carriage of them, we would allow them to be taken in the aggregate, but, if they are to be paid by the receivers, then each individual must pay for his separate weight: in like manner, if a quantity of packages for one person are congregated from fifty houses in town, and are to be paid by him, this would entitle him, as the party paying the charges, to this privilege."

In several instances the Company have charged manufacturers and tradesmen at Stroud and Cheltenham (not carriers), to whom they have given credit for the carriage of their goods, and with whom the Company have had monthly accounts for such carriage, according to the aggregate weight of the same class goods carried by them for such manufacturers, warehousemen, or others (not carriers) during the month; that is to say, have added together the weight of the same class goods carried on the several days during the month, and have charged the manufacturers, warehousemen, or others (not carriers) upon and according to the gross weight of each class goods so carried during the month: but this privilege has never been afforded by the Company to the carriers or the plaintiff.

The system of charging in the aggregate stated in the above letter has been pursued by the Company when employed to carry goods for the public at large, not carriers, from the date of that letter to the present time, and during all that period the Company stated in their printed bills of charge, immediately below the scale of charges—"The above charges apply to aggregate quantities of goods, which are divided into five classes, according to their value, bulk, &c., a small increase being charged upon less than a ton, as specified below:" and on this statement the Company acted towards the public, but not towards the carriers, during the said period.

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In like manner, the Company charged the carriers, but not the public, separately for every package sent by the railway, of whatever kind, class, or weight, intended ultimately for delivery to a different person by the carrier's own consignee, although, as before mentioned, the Company had nothing to do with such ultimate delivery, but always delivered the carrier's goods to the carrier's own consignee only, and refused to recognize any other.

In cases where the Company carried several packages for the plaintiff, or any other carrier belonging to several consignees, or belonging to or intended for final delivery by the plaintiff or other carrier, or his agent, to different persons, the Company were put to no more labour, expense, or trouble than when the packages belonged to or were to be delivered by the plaintiff or other carrier, or his agent, to one and the same person, nor to any more risk, except such as necessarily arises (if any arise) from the mere fact of the packages belonging to several owners, instead of to one owner.

It appears, that, during the time in question in this cause, traders not being carriers have frequently sent by the railway consignments comprising several packages of goods sent by them in the way of their trade to their customers, and on which such traders paid the Company's charges. But it does not appear that the Company ever made any extra charge in such cases on account of any increased risk (if any such existed) arising from the circumstance of the several packages belonging to different owners. In all cases, however, in which the packages were to be delivered to several consignees, such traders not paying the charges as aforesaid, such packages were charged separately, and not on the aggregate weight.

From the 28th of February, 1842, till the commencement of this suit, the Company enforced a system of charging the plaintiff and other carriers for the carriage by the weight of every parcel of goods above 2 cwt. and under 1

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ton separately, even though the several parcels were intended, not merely for the plaintiff's or other carrier's consignee, but also for ultimate delivery to the same person, and though they were goods of the same class carried by the same train, in all cases where the names of the carrier's consignor or consignors of such goods were not given; but, in all cases where the names of such consignors were given, all such parcels, if sent from the same carrier's consignor to the same carrier's consignee, were charged on the aggregate, and not separately. The carriers had notice of this system.

From June, 1840, down to this day, whenever a butcher, cheesefactor, tea-dealer, or any merchant or trader, not a carrier, has sent several parcels of goods of the same class addressed to one consignee, to be carried by the Company by the same train on the railway, or addressed to different consignees, yet sent by one consignor, who paid the Company's charge for carriage, the Company have charged such persons for the carriage of the goods by the aggregate weight of all the parcels, and not by the separate weight of each parcel, the charge by the aggregate being in all cases less than that by the separate weights of the parcels.

In order the better to be able to enforce their said system of charging, the Company have from the year 1841 to this day required (and the requisition has been complied with by the carriers) that every carrier who has brought goods to any of the Company's stations to be carried on the railway, should, before the goods were carried by the Company, fill up and deliver to the Company's clerks, two printed forms, one entitled "The Carrier's Declaration Ticket," the other "The Carrier's Ticking-off Note;" the former of these, viz. the Declaration Ticket, has been required to be filled up at the head thereof with the date of delivery of the goods to the Company, the name of the carrier employing the Company to carry, the name of the carrier himself, or of his agent, as the consignee to whom the Company were or

are to deliver the goods at the end of the journey on the rail, the place or station to which the Company were to carry the same, and the particular railway train by which the goods were to go, the load, number, classes, and the gross weight of all the goods sent by the carrier by that train to the same station: and the body of the "Carrier's Declaration Ticket" has been required to be filled up with the number of each parcel, and, if any package contained more than one parcel, then with the number of each parcel in such package, the name and address of the ultimate consignee of each parcel, that is to say, not of the person to whom the Company were to deliver the parcel, but of the person to whom the carrier or his agent would have to deliver the same after the Company had carried and delivered the same to the carrier or his agent, the weight of each parcel, with the total weight of all the parcels: and the foot of the "Declaration Ticket" has been required further to be filled up with the total weight of the goods in each class, in a separate line, with that of the empties in another line, and the grand total of weights and sums added up at the bottom: and every "Declaration Ticket" has been required to be and has been filled up as above stated, and signed by the carrier employing the Company, or his agent, and delivered to the Company's clerks before the goods were carried by the Company.

The "Carrier's Ticking-off Note" has been and is required to be filled up at the head thereof with the hour of the train and day of the month and year at which the goods were to go, the station to which the goods were to be carried, and the name of the carrier sending the goods, and his or his agent's name to whom they were to be delivered by the Company. The body of the "Ticking-off Note" was and is divided into columns, of which those headed "Name" and "Address" were to be filled up by the carrier with the names and addresses of the ultimate consignees of each parcel as before explained; the column

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headed "Description" with a description of each parcel of goods; the several columns headed "Class 1st," "Class 2nd," "Class 3rd," "Class 4th," "Class 5th," and "Packages under 2 cwt.," with the respective weights of the parcels falling under each of those heads; and the column "*£ s. d.*" was left blank, for the Company's clerks to fill up; while the line beginning with the words "Weights transferred to declaration" was filled up by the carrier with the total weights of the goods in each column of the above five classes and of the packages under 2 cwt. set down at the foot of each column respectively.

The course of business between the carriers and the Company at their stations was and is for one of the Company's servants at the station of departure to examine the weights and descriptions of the packages brought there to be carried, and, on finding them correct, or not suspecting them to be incorrect, to tick them off in the column of the said ticking-off note entitled "Ticking Column outwards," and to write his name at the foot after the printed words "Checked by," and fill in the name of the truck.

The "Ticking-off Note," when thus filled up and checked, was delivered to the Company's clerks, who made out a duplicate of it, filling into the last column the amounts charged by the Company to the carrier for the carriage of the goods, and delivered such duplicate to the carrier, keeping the original filled up by the carrier. The amount of the Company's charges so filled in by the Company's clerks, after deducting the allowance of 10 per cent. and the small parcel allowance in cases where the Company made those allowances, was then paid (unless credit was given) by the carrier in cash to the Company's clerks.

For the better understanding of the "Carrier's Declaration Ticket" and "Ticking-off Note," copies of those documents, as they appeared when filled up complete, were annexed to and were to be taken as part of the case.

The plaintiff has during the years 1842 and 1843 carried

on a very extensive business as a carrier from and to various towns in connexion or communication with the Great Western Railway, and has consequently during those years employed the Company very extensively to carry goods for him; and they have accordingly carried them for him from and to the several stations following upon the said railway, viz. Paddington, Reading (subject to the statement before made with regard to that place), Steventon, Farringdon Road, Cirencester, Bath, and Bristol.

The goods which the plaintiff has employed the Company to carry as mentioned in this case, have never been the plaintiff's own goods, but goods belonging to third persons, who employ the plaintiff to carry them (as, for instance, from London to Gloucester), and the plaintiff, after carrying them to the Company's station, has then employed the Company to carry them part of the journey on their railway (for instance, from Paddington to Cirencester), and there deliver them to the plaintiff's agent, who has then carried them the remainder of the journey in the plaintiff's own vehicles, and delivered them to the ultimate consignees. On all occasions where the Company have so carried goods for the plaintiff, they have received the goods from the plaintiff or his agent only, and at the end of the journey on the railway have delivered them to the plaintiff or his agent only, and have treated and dealt with him as both the consignor and consignee of the goods, have received payment for the carriage of him only, and, in case of loss, have made satisfaction to him only, and have refused to recognize or deliver to any other person than the plaintiff, or to deal with or follow any orders from the persons who have employed the plaintiff to carry the goods. The plaintiff only, and not the Company, has had any contracts or dealings with the persons so employing him to carry the goods; they have always paid him, and not the Company, for the carriage; and, in cases of loss or damage, he, and not the Company, has made satisfaction to them for the

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same. The other carriers for whom the Company have received goods have dealt with the Company and their own employers in the same manner and on similar terms.

The plaintiff, in his dealings with the Company, has always performed the collection of the packages and parcels, whether large or small, and the delivery of them to the Company at their stations from which the same were to be carried by the Company, by his own horses, carts, and servants, in the same way and to the same extent as those carriers to whom the Company has allowed the said deductions of 10 per cent. and of 5d. and 10d. on the small parcels; and he has also by his own servants always performed the weighing, loading, and unloading of his packages and parcels, as above explained, with the exception of the aid rendered by the Company's servants as above mentioned, in the same manner and to the same extent as the carriers to whom the Company have allowed the said deductions as aforesaid.

It is admitted, that the plaintiff is the most extensive carrier on the line; and that the assistance rendered by the Company to him is not more than they render to any other carrier.

After the goods have been carried by the Company to their destined station on the railway, the plaintiff has, by his own or his agents' horses, carts, and servants, always performed the delivery of the packages and parcels so carried for him by the Company to the ultimate consignees, in the same way and to the same extent as other carriers.

The plaintiff has never requested or called upon the Company to perform any of those things for which the said sums of 10 per cent. and 10d. and 5d. respectively were allowed as aforesaid. In cases in which those allowances have not been made to the plaintiff, the Company have never refused to allow their servants to load and unload the plaintiff's goods; and in no instance where the Com-

pany have refused to make or continue the said allowance of 10 per cent. and 10*d.* and 5*d.* respectively as aforesaid, does it appear that they refused to place him on the same footing with the rest of the public, to whom such allowances as aforesaid were not made by the said Company.

The plaintiff has usually paid the Company in cash their charges for the carriage of goods for him at the time when the goods were delivered by him to them to be carried, or before they were delivered to him or his agent after being carried by the Company.

The Company on the 24th of February, 1842, discontinued giving the plaintiff credit, and have not since done so; stating as their reason, by letter to the plaintiff of the same date, "the want of understanding as to the settling of the charges to Mr. Parker for the carriage of his goods."

The first head of claim made by the plaintiff in this action is to the above-mentioned allowance of 10 per cent. upon the charges made by the Company and paid by him for the carriage of goods for the plaintiff on the railway from the 28th of February, 1842, to the 27th of April, 1843.

The Company made this allowance to the plaintiff on their charges, that is to say, deducted it from their charges for the carriage of all goods which they carried for him on their railway during the last-mentioned period, from Paddington Station to Bath Station, and vice versa, and from Paddington Station to Farringdon Road Station, and vice versa, except on goods coming up to Paddington from Fairford. But the Company refused to make the said usual allowance of 10 per cent. on their charges, and compelled the plaintiff to pay the full charges for the carriage of all goods which they carried for him on their railway during the last-mentioned period between the following pairs of stations, that is, from one to the other, viz. Paddington and Steventon (except, as to these stations, the period between

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the 28th of February, 1842, and the 30th of April following, during which time the Company made to the plaintiff the said allowance of 10 per cent. upon the carriage of goods for him upon the said railway between those stations), Paddington and Cirencester, Paddington and Bristol, Bath and Steventon.

By the term "full charges" now and hereafter used in this case, is meant the charges set down in the said printed bills and scale-book in force at the time in question, and there stated to include loading and unloading of all packages, and the collection and delivery of parcels of 2 cwt. and under; being the same charges (with the exception arising from the charging by the separate weight of each parcel, instead of the aggregate weight of several packages of the same class, as mentioned under the third head of claim) as the Company charged the public, not carriers, during the period aforesaid, for the carriage and loading and unloading of their goods, and for the collection and delivery of parcels of and under 2 cwt. as above mentioned.

No difference existed during the said period from the 28th of February, 1842, to the 27th of April, 1843, between the nature or extent of the services rendered by the Company to the plaintiff at or between the said stations, in respect of goods carried between which the said allowance was made, and the services rendered by them to the plaintiff at or between those stations in respect of goods carried between which the said allowance was refused; nor was there any difference in the mode in which the plaintiff's business with the Company was conducted at the said stations respectively. But the Company, in all cases where the allowance of 10 per cent. was not made or not continued with the plaintiff, were ready and willing to perform all the things which formed the consideration for the said allowance of 10 per cent.

On every occasion during the said period from May the 1st, 1842, to the 27th of April, 1843, when the plaintiff

delivered goods to the Company, at any of the said stations (in respect of goods carried between which the Company refused the allowance aforesaid), to be carried by them for him between either of those pairs of stations, the plaintiff or his agent, after the usual "Carrier's Declaration Ticket" and "Ticking-off Note" for and in respect of such goods had been filled up, signed, and delivered to the Company's clerks, according to the course of business above explained, and after the Company's clerks had delivered to the plaintiff or his agent the duplicate of the "Ticking-off Note" filled up with the Company's full charges for the carriage of the said goods, as above explained, and before the plaintiff had paid the charges for such carriage, the plaintiff required the Company to deduct the said allowance of 10 per cent. from their said full charges for the carriage of the said goods as aforesaid, and offered to pay the amount of such charges less such deduction, and required the Company to carry the said goods for the plaintiff on their said railway from and to the said stations respectively for the amount of such charges, less such deduction of 10 per cent. as aforesaid. But, on every such occasion, the said Company refused to carry the said goods for the plaintiff, unless the plaintiff would pay them their full charges (using that term in the sense above explained) for the carriage of the said goods, without making any such deduction or allowance as aforesaid; and so informed the plaintiff: and thereupon, on every such occasion, the plaintiff, in order to get the Company to carry his goods as aforesaid, was obliged to pay and did pay in cash to the Company for the carriage of his said goods as aforesaid, under protest against their right to demand it, the amount of their said full charges, without any such deduction as aforesaid; and, after such payment, the Company always carried the said goods on their said railway as desired by the plaintiff.

The total amount of the said allowance of 10 per cent., had it been made on the sums paid by the plaintiff to the

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Company under protest as aforesaid during the period last above mentioned, for the carriage of his goods by them between the last-mentioned stations, would have been 382*l.* 18*s.*; and this sum of 382*l.* 18*s.*, or so much of it, if any, as the plaintiff may be entitled to, is the first head of the plaintiff's claim in this action.

The reason which the Company assigned to the plaintiff during the above period for disallowing the said deduction of 10 per cent. to the plaintiff, as to the goods carried for him between the stations at Paddington and Steventon, was this, that, just before the plaintiff entered upon the carrying business to and from Steventon, the said business had belonged to and had been carried on by one T. R. Bolton. An admission has been made in the following terms; viz. that Bolton was deprived of the allowance in consequence of having packed goods; that the plaintiff, having bought his business, was denied the allowance in the business, which the Company considered by Bolton's conduct was not entitled to the allowance.

The Company have never assigned any reason to the plaintiff for refusing to allow him the said deduction of 10 per cent. on their charges for the carriage of goods carried for him between the said stations of Paddington and Cirencester, Paddington and Bristol, Bath and Steventon.

It has not been proved that the plaintiff has, by himself or his agents or servants, packed small parcels together into a large one, or altered the addresses on packages, to evade the Company's higher rates of charge, or otherwise infringed the Company's regulations, any further than appears (if it do appear) on the face of the case.

Between the said stations of Paddington and Cirencester, Paddington and Bristol, Bath and Steventon, the plaintiff purchased the business previously carried on by one Samuel Baylis, to whom the Company had signified that he was not to have the aforesaid allowances, because

certain persons, being his predecessors in the business, had failed in the Company's debt, except upon the terms of his liquidating such debt. The plaintiff was aware of this when he purchased the business of S. Baylis.

The second head of claim made by the plaintiff is, to the above-mentioned allowance of 5*d.* and 10*d.* for the collection and delivery of small parcels, (which term is now and hereinafter used to mean parcels of and under 1 cwt., and of and under 2 cwt. respectively), carried by the Company on their railway for the plaintiff between the 28th of February, 1842, and the 27th of April, 1843, and the full charges (using that term in the sense above explained) for carriage of which were paid by the plaintiff.

The Company made this alteration to the plaintiff on their full charges, that is to say, deducted it from their full charges, for the carriage of all small parcels which they carried for the plaintiff during the last-mentioned period between the following pairs of stations, that is, from the one to the other of the same pair; viz. Paddington and Bath, Paddington and Farringdon Road, except on parcels coming up to Paddington from Fairford; and also allowed it to the plaintiff, upon the carriage of such parcels for him to and from the stations at Paddington and Steventon, between the 8th of February, 1842, and the 30th of April following. But the Company refused to make the said allowance or deduction of 5*d.* and 10*d.* respectively from their charges, and compelled the plaintiff to pay their full charges for the carriage of all small parcels which they carried for him on their railway during the period between the 28th of February, 1842, and the 27th of April, 1843, between the following pairs of stations, that is, from one to the other; viz. Paddington and Steventon (except as aforesaid), Paddington and Cirencester, Paddington and Bristol, Bath and Steventon.

There was no difference during the period last aforesaid between the said stations in respect whereof the said al-

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allowance on small parcels was allowed and the said stations in respect whereof it was refused, as to the extent of the services actually performed by the Company for the plaintiff at or between such stations, or the extent of the actual services rendered by the plaintiff in relation to the small parcels. But, whenever the Company refused to make the said allowances to the plaintiff, they were ready and willing to place the plaintiff on the footing of one of the public with regard to the collection and delivery of such small parcels; of which readiness and willingness the plaintiff was aware, having had the ordinary public notice.

On every occasion during the last-mentioned period, when the plaintiff delivered small parcels to the Company, at any of their said last-mentioned stations, to be carried by them for him on the railway between either of those pairs of stations, that is, from one to the other of each pair, the plaintiff or his clerk, after the usual "Carrier's Declaration Ticket" and "Ticking-off Note" had been filled up, signed, and delivered to the Company's clerks, according to the course of business above explained, and after the Company's clerk had delivered to the plaintiff or his clerk the duplicate of the "Ticking-off Note" filled up with the Company's charges for the carriage of such small parcels, as above explained, such charges being always the full charges, as above explained, and before the plaintiff had paid the charges for such carriage, the plaintiff required the Company to deduct the said allowance of 5*d.* on parcels of and under 1 cwt., and of 10*d.* on parcels of and under 2 cwt., from their said full charges for the carriage of such small parcels as aforesaid, and offered to pay the amount of such charges less such deduction as aforesaid, and required the Company to carry the said small parcels for the plaintiff on their railway from and to the said stations respectively for the amount of such charges less such deduction as aforesaid. But, on every such occasion, the Company always refused to carry such small parcels for the plaintiff, unless he

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would pay them for the carriage of the said goods the amount of their said full charges, and without making any such deduction or allowance as aforesaid, and so informed the plaintiff: and thereupon, on every such occasion, the plaintiff, in order to get the Company to carry the said small parcels as aforesaid, was obliged to pay and did pay in cash to the Company, for the carriage of such small parcels as aforesaid, under protest against their right to demand it, the amount of their said full charges for carriage, without any such deduction as aforesaid; and thereupon the said Company always carried the said small parcels as desired by the plaintiff.

The total amount of the said allowance of 5*d.* on every parcel of and under 1 cwt., and 10*d.* on every parcel of and under 2 cwt., so carried by the Company for the plaintiff as aforesaid between the last-mentioned stations, that is, from the one to the other of the same pair, during the period last mentioned, and the full charges for the carriage whereof were so paid by the plaintiff under protest as aforesaid, would have been 238*l.* 17*s.* 7*d.*; and this sum of 238*l.* 17*s.* 7*d.* is the second head of the plaintiff's claim in this action.

The statements hereinbefore contained with regard to the reasons for the disallowance of the 10 per cent., apply to the disallowance of the 5*d.* and 10*d.*; and wherever no reason was assigned for the one, none was assigned for the other.

The third head of claim made by the plaintiff is, to the amount of over-charges, if any, made by the Company to him on packages of goods exceeding 2 cwt. and under 1 ton, and carried by them as common carriers for him on their railway between the said 28th of February, 1842, and the 27th of April, 1843, by charging for each package separately, instead of charging the several packages by the aggregate weight, in cases where several packages of goods of the same class were carried by the same train, at the same time, from the same station to the same station, and

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where the Company were employed by the plaintiff to carry the said packages, and deliver them to him or his agent at the end of their journey on the railway, both in cases where such packages were sent to the plaintiff by one consignor or several consignors, and in cases where they were to be delivered by him or his agent to one and the same ultimate consignee, and also where the said packages were intended for delivery by the plaintiff or his agent to different ultimate consignees.

It appears, that, on some occasions subsequent to the 1st of April, 1843, the plaintiff's agent refused to inform the Company's agents whether packages were from one or from several consignors.

The Company enforced their above-mentioned system of charging every one of several packages exceeding 2 cwt. and under 1 ton by its separate weight, instead of charging all packages over that weight of the same class, and going by one train from and to the same place, by their aggregate weight, on all occasions during the period last aforesaid, when they carried packages above 2 cwt. and under 1 ton on their railway for the plaintiff, without exception of any stations.

On every occasion during the last-mentioned period, when the plaintiff delivered to the Company at any one of their said stations several packages of goods of the same class, exceeding 2 cwt. each and under 1 ton, to be carried by them for him on their said railway, by the same train, from such one of their said stations to another of their stations, and then to be delivered all at the same station to the plaintiff or his agent, after the usual "Carrier's Declaration Ticket" and "Ticking-off Note" had been filled up, signed, and delivered to the Company's clerks, according to the course of business above explained, and after the Company's clerks had delivered to the plaintiff or his clerk the duplicate of the "Ticking-off Note" filled up with the Company's full charges for the carriage of such

packages above 2 cwt. and under 1 ton, as above explained, such charges being always made out on the weight of each package separately, according to the rates fixed by the Company's published scale-book and list of rates then in force and then charged to the public, and not on the aggregate weight of the several packages of the same class, and before the plaintiff had paid the charges for such carriage of such packages, the plaintiff required the Company to charge for the carriage of such packages as aforesaid on the aggregate weight of the several packages above 2 cwt. and under 1 ton each of the same class, to be carried for the plaintiff, by the same train, from the same station to the same station, and there delivered to the plaintiff, according to the rates fixed by their said scale-book and list of rates then in force, and not on the weight of each of such packages separately, and offered to pay the Company the amount of their charges for the carriage as last aforesaid of such packages as last aforesaid, calculated on the aggregate weight of such packages, according to the rates aforesaid, and required the Company to carry the said packages for the plaintiff by the same train, from the same station to the same station, and there deliver the same to the plaintiff, for the amount of their charges for such carriage, calculated on the aggregate weight of such packages of the same class, as above mentioned. But, on every such occasion, the Company always refused to carry such packages for the plaintiff, unless he would pay them the amount of their said full charges for such carriage of such packages, calculated, according to the published rates aforesaid, on the separate weight of each of the said packages, as above mentioned, which always exceeded the amount of such charges calculated on the aggregate weight of such packages; and so informed the plaintiff: and thereupon, on every such occasion, the plaintiff, in order to get the Company to carry the said packages, was obliged to pay and did pay in cash to the Company, under protest against their

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right to demand it, the amount of their said full charges for the carriage of such packages as aforesaid, as calculated by them on the separate weight of each package above mentioned; and the Company thereupon carried such packages, as required by the plaintiff.

The total amount of the charges thereby made by the Company against the plaintiff, and paid by him under protest as aforesaid, during the last-mentioned period, for the carriage of such packages as last aforesaid, going by the same train, from the same station to the same station, over and above what would have been the amount of the said charges calculated on the aggregate weight of all packages of the same class carried for the plaintiff by the same train from and to the same station, according to the published rates then in force as aforesaid, is 202*l.* 3*s.* 9*d.*; and this sum is the third item claimed by the plaintiff in this action.

That portion of the sum of 202*l.* 3*s.* 9*d.* which consists of charges made to the plaintiff by the Company as above mentioned, for the carriage of such of the same packages of the same class above 2 cwt. and under 1 ton as were sent by one original consignor to one ultimate consignee, and were carried by the same train from the same station to the same station, over and above what the Company would have charged the plaintiff for the carriage had he disclosed to them the names of the said consignors, amounts to the sum of 17*l.* 5*s.* 5*d.*

There is no direct evidence of the amount in value of the additional risk (if any such additional risk there be) to the Company by the circumstance that the goods sent by the plaintiff and other carriers belonged to several owners, instead of to a single owner. It, however, appears that many actions have been brought against the Company by their own customers; but it does not appear that any have ever been brought against the Company by the customers of the carriers.

The Court is to be at liberty to draw any inference from the facts stated herein, which in their judgment a jury ought to make.

It is agreed that the action was brought in due time, and that due notice of action was given, if any was necessary, and that the venue was laid in the proper county.

By the order of *Nisi Prius* under which the case was stated, the Company undertook, if the judgment of the Court should be in favour of the plaintiff, to repay him the amount of over-charges, if any, down to the day of that judgment, on the principle thereof; and, if any doubt or difference should arise on the amount then claimed by the plaintiff, such amount to be settled by the barrister by whom the case was settled between the parties. And it was agreed, that, if the judgment of the Court should be against the plaintiff, he was to be at liberty to turn the special case into a special verdict.

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Talfourd, Serjt., (*Channell*, Serjt., *R. V. Richards*, and *Alexander* were with him), for the plaintiff (a).—First, the charges are unreasonable and unequal. By the terms of their acts, the Company are bound to make equal charges to all persons using the railway. It is a highway of a certain construction, which the public has a right to travel on and use on certain terms. The Company have become in fact the only persons who carry upon the line. It is quite clear, therefore, that such a clause as the 24th of the 2 Vict. c. xxvii, is essential to the protection of the public; otherwise, if the Company chose to favour one class of persons, the others would be ruined. Now, have they violated that clause in their dealings with the plaintiff? The plaintiff is entitled to have his goods carried, with proper deductions for loading, &c.; and those deductions not being made in this case, the charges are unreasonable.

(a) January 24th and 26th, before *Tindal*, C. J., *Erskine*, *Maule*, and *Cresswell*, J.

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The complaint divides itself into two classes: 1st. The difference made between the carriers on the line generally and the public. In general, they make certain deductions, which are found to be fair and just, putting the carriers on the same footing as the public. But, then, for parcels under 5 cwt., they are entitled by the act to make their own reasonable charge; and they give to their public customers the advantage of what is called "the lumping system," which they deny to the carriers. The object and effect of this is to engross not merely the whole carriage, but the whole carriers' trade. 2ndly. They make a difference between the plaintiff and other carriers, by saying to him, in effect, that they will not carry for him unless he allows them to collect and distribute for him, or pays them for so doing; and yet they will not recognize any one but the carrier as consignor or consignee. The Company, therefore, do a wrong to the plaintiff, in refusing to carry for him on the same terms as for the public in one instance, and for other carriers in the other, and so have misconducted themselves in the duties cast upon them by the common law, and especially by their acts; and, therefore, he has ground of action against them: *Palmer v. The Grand Junction Railway Company (a)*, *Pickford v. The Grand Junction Railway Company (b)*.

Then, the action is well brought, for under their acts a mandamus would lie, or an indictment might be framed against the Company for failing in their duty; and, therefore, they having taken money for the performance of a duty imposed upon them by law, the plaintiff has an action against them for money had and received: *Smith v. Bromley (c)*, *Brisbane v. Dacres (d)*, *Astley v. Reynolds (e)*, *Dew v. Parsons (f)*, *Morgan v. Palmer (g)*, *Ansell v.*

(a) 4 M. & W. 749.

(b) Antè p. 193; 10 M. & W. 399.

(c) 2 Doug. 697, n.

(d) 5 Taunt. 143.

(e) 2 Stra. 915.

(f) 2 B. & A. 562.

(g) 2 B. & C. 729; 4 D. & R. 283.

Waterhouse (a), *Waterhouse v. Keen* (b), *Parsons v. Blandy* (c).

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Bompas, Serjt., (*Whateley* and *Keating* were with him), *contra*.—It is not disputed that carriers are bound to carry for the public for a reasonable reward, though it is difficult to see why, originally, they should have been forced to contract with the public. At all events, the public cannot say that a common carrier shall carry at the rate which they think reasonable. The general rights of carriers must be looked to before the act of Parliament. But, under the act, this important question arises,—whether one carrier has a right to call upon another carrier to carry all the disadvantageous goods for him, and himself to carry those which are profitable. When two persons have a duty imposed upon them, one cannot shift it to the other, who has only an equal liability: the duty is imposed individually, and the right is reciprocal. The object of the act was, that the railway should be used as a turnpike-road. It is submitted, therefore, first, that carriers, as such, have no right to insist on having their goods carried at all; at any rate, the Company may say that they will not recognize them as carriers, but only as part of the public, or they may treat them as servants, and make what terms and what deductions they please for their services. So, with regard to the small parcels, the public advantage requires that a reasonable average should be fixed. As to the lumping system, they are entitled to charge for several parcels even from the same consignor; but they waive that right with regard to the public, though not with regard to the carriers, which they have a perfect right to do. [He cited *Doctor and Student*, c. 38, and *Hyde v. The Trent and Mersey Navigation Company* (d).]

(a) 6 M. & S. 385.

(b) 4 B. & C. 200; 6 D. & R. 257.

(c) *Wightw.* 22.

(d) 5 T. R. 389.

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Then, this action is not maintainable. The Company have a right to refuse any tender, but of money; and the tender should be of the sums paid by the public, as the Company have a clear right to deliver the goods. The plaintiff, therefore, by a tender of money and service, cannot create a right of action on refusal to accept them. This was a voluntary payment, made with a knowledge of all the circumstances, and is, therefore, within *Brisbane v. Dacres* (a). [He cited also *Bilbie v. Lumley* (b), *Knibbs v. Hall* (c), and *Brown v. M^cKinally* (d).]

Talfourd, Serjt., in reply, cited *Pozzi v. Shipton* (e).

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the Court. —This case was argued before us during the last Term, when two questions were raised for the opinion of the Court; viz. first, whether the defendants were justified in compelling the plaintiff to pay the several sums of money mentioned in the case, under the circumstances therein stated; and, secondly, if they were not, whether the plaintiff can recover them in this action for money had and received to his use.

In order to answer the first question, it is necessary to examine the several acts of Parliament which the defendants have obtained for the purpose of enabling them to construct the Great Western Railway as it now exists, and to use it as carriers of goods and passengers for reward. The first of those acts is the 5 & 6 Will. 4, c. cvii. That statute begins by empowering certain parties to make a railway; and the 1st and 8th sections relate to the construc-

(a) 5 Taunt. 143.

(b) 2 East, 469.

(c) 1 Esp. 84.

(d) Id. 279.

(e) 8 A. & E. 963.

tion of the railway, and the acquisition and enjoyment of property therein. Then the 168rd section enacts, "that all persons shall have free liberty to pass along and upon and to use and employ the said railway, with carriages properly constructed as by this act directed, upon payment only of such rates and tolls as shall be demanded by the said Company, not exceeding the respective rates or tolls by this act authorized, and subject to the provisions of this act, and to the rules and regulations which shall from time to time be made by the said Company or by the said directors, by virtue of the powers to them respectively by this act granted." The next two sections fix a maximum for the rates and tolls to be taken by the Company for passengers, goods, or cattle conveyed upon the railway. The 166th section enables the Company to provide locomotive or other power for drawing or propelling passengers or goods along the railway, and to charge for such engines or power in addition to the rates and tolls before given.

So far, the provisions do not appear to contemplate that the Company themselves would act as carriers of either passengers or goods. But the next section (the 167th) enacts, "that it shall be lawful for the said Company, and they are hereby authorized, if they shall think proper, to use and employ locomotive engines or other moving power, and in carriages or waggons drawn or propelled thereby to convey upon the said railway, and also along and upon any other railway communicating therewith, all such passengers, cattle, and other animals, goods, wares, and merchandize, articles, matters, and things, as shall be offered to them for that purpose, and to make such reasonable charges for such conveyance as they may from time to time determine upon, in addition to the several rates or tolls by this act authorized to be taken." The 147th section empowers the Company to reduce all or any of the rates or tolls authorized to be taken, and again to raise the same or any of them, so

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that they shall not at any time exceed the amount by that act authorized to be taken, with this proviso in the 175th section—"that the aforesaid rates and tolls to be taken by virtue of this act, shall at all times be charged equally and after the same rate per ton per mile, throughout the whole of the said railway, in respect of the same description of articles, matters, or things, and that no reduction or advance in the said rates and tolls shall, either directly or indirectly, be made partially or in favour of or against any particular person or Company, or be confined to any particular part of the said railway, but that every such reduction or advance of rates and tolls upon any particular kind or description of articles, matters, or things shall extend to and take place throughout the whole and every part of the said railway, upon and in respect of the same description of articles, matters, and things so reduced or advanced, and shall extend to all persons whomsoever using the same, or carrying the same description of articles, matters, and things thereon; anything to the contrary thereof in anywise notwithstanding." Had this been the only enactment relating to equality of rates, it might have been contended that it does not apply to the carriage of goods or passengers by the Company themselves acting as carriers, but only to the rates or tolls to be charged for goods or passengers conveyed by others. But by the 1 Vict. c. xcii, the Company were authorized to extend the line originally provided for to Paddington, and to convey goods and passengers along such extended line. Then followed the 2 Vict. c. xxvii, which applied to the whole line so extended; and the 24th section enacts, "that the charges by the said recited acts, or either of them, authorized to be made for the carriage of any passengers, goods, animals, or other matters or things to be conveyed by the said Company, or for the use of any steam power or carriage to be supplied by the said Company, shall be at all times charged equally to all persons, and after the same rate per mile, or per ton per mile, in re-

spect of all passengers, and of all goods, animals, or carriages of a like description, and conveyed or propelled by a like carriage or engine passing on the same portion of the line; and no reduction or advance in any charge for conveyance by the said Company, or for the use of any locomotive power to be supplied by them, shall be made, either directly or indirectly, in favour of or against any particular Company or person travelling upon or using the same portion of the said railway."

From these several enactments it appears clearly to have been the intention of the Legislature, that the parties incorporated should be empowered to construct the railway, and hold it as their property, and derive certain profits from it, but that every member of the community should have an equal right to use it on the terms prescribed by the act; and that the payment to be made for such user, whether under the denomination of rates, or tolls, or charges fixed by the Company, should be reasonable and equal to all persons, without reference to the particular advantage derived by any individual or class of individuals from such user. And it is to be observed, that the language of these acts of Parliament is to be treated as the language of the promoters of them: they ask the Legislature to confer great privileges upon them, and profess to give the public certain advantages in return. Acts passed under such circumstances should be construed strictly against the parties obtaining them, but liberally in favour of the public.

Now, have the charges been reasonable and equal in the instances stated in this case, or was there any advance in the charges for the carriage of goods by the Company directly or indirectly against the plaintiff? And, first, with regard to the allowance of 10 per cent.: as to that, it appears that the Company have always, for the carriage of goods, charged the public at the rates specified in certain printed bills, and a scale-book annexed to this case; and

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that for such charge they performed the loading and unloading and reloading of the goods, as explained in the case, and also the weighing, whenever they thought that necessary; but that, by a general arrangement with carriers, the latter have performed all those duties, and, in addition, have made out what are called "Ticking-off Notes," and "Carrier's Declaration Tickets," and have been allowed by the Company a deduction of 10 per cent. from the charges made to the public at large. And the case proceeds to state, that the loading, unloading, and weighing, and the preparation of ticking-off notes and carrier's declaration tickets, was a reasonable equivalent for the allowance of 10 per cent.; or, in other words, that the carriers, discharging those duties at their own expense, and receiving an allowance of 10 per cent., are thereby placed on an equal footing with the public, who are at no such expense and trouble. Can it then be said, that the same charge is reasonable both for the public at large and the carrier, when the latter discharges at his own expense, and for the benefit of the Company, certain duties for which an allowance of 10 per cent. is no more than a fair equivalent? And, if that allowance is refused to one carrier, although willing to discharge, and in fact discharging all that other carriers do in respect of it, can it be said that the Company do not, directly or indirectly, advance against such carrier their charges for the conveyance of goods by them? It appears to us that the full charge to the plaintiff, a carrier, under such circumstances, is not reasonable; and that the charge of the Company for the conveyance of goods by them has been raised against him; and that they could not legally make the larger charge upon him, notwithstanding the statement in the case, that, where the allowance of 10 per cent. was not made or continued with the plaintiff, the Company were ready and willing to perform all the things which formed the consideration for that allowance.

As to the second head of claim, viz. the allowance of

5*d.* and 10*d.* for the collection and delivery of parcels of and under the weight of 1 cwt., and of and under the weight of 2 cwt. respectively, the case of *Pickford v. The Grand Junction Railway Company* (a) is a direct authority that the Company had not a right to charge the plaintiff the same sum for the carriage of goods for him, as they charge to the public; for, in the latter case, the charge includes the cost of collection and delivery, which the plaintiff did for himself. There the Company charged 65*s.* per ton for carriage, including delivery; and it was held that they had no right to impose the same charge for carriage without delivery; and, the sum of 10*s.* per ton having been allowed by the Company to the carriers who delivered goods for them, it was held that 55*s.* per ton was the proper price to be charged for the carriage of goods to a carrier who delivered them himself.

In like manner, the present defendants, having allowed to other carriers 5*d.* and 10*d.* for the collection and delivery of the two descriptions of small parcels before mentioned, have shewn that the charge specified in their bills and scale-book, which includes collection and delivery, ought to be diminished by those sums to persons who collect and deliver for themselves. It was argued, that the Company were ready and willing to place the plaintiff on the footing of one of the public with regard to the collection and delivery of small parcels: but they had no right to compel him to accept that service at their hands, or pay them for it—as was decided in the case referred to.

The third head of claim arises out of an alleged difference in the charges made by the Company to the public at large and to carriers for the conveyance of goods, such difference not being directed against any individual carrier, but against all carriers as contra-distinguished from individuals of the public at large. As to this difference the

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(a) *Antè*, p. 193; 10 M. & W. 399.

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case states, that, when one of the public has brought several packages of goods and paid the charges, the Company have charged him on the weight of the aggregate, although they may have belonged to different consignees; also, if several of the public have brought several packages addressed to one consignee who was to pay the charges, such consignee has been charged upon the weight of the aggregate. But, if a carrier has brought several packages consigned by or to different individuals, he has been charged upon the separate weight of each, unless it was known that more than one package belonged to the same sender or was going to the same consignee, in which case all belonging to the same sender and going to the same consignee were charged upon their aggregate weight. And in all such cases where carriers were concerned, the Company dealt with and recognized the carriers only as their consignor and consignee of the goods. In addition to this, from the 28th of February, 1842, till the commencement of this suit, the Company enforced a system of charging the plaintiff and other carriers for the carriage by the weight of every parcel of goods above 2 cwt. and under 1 ton separately, even though the several parcels were intended, not merely for the plaintiff's or other carrier's consignee, but also for ultimate delivery to the same person, and though they were goods of the same class, carried by the same train, in all cases where the names of the carrier's consignor or consignors of such goods were not given; but in all cases where the names of such consignors were given, all such parcels, if sent from the same carrier's consignor to the same carrier's consignee, were charged on the aggregate and not separately. The case further states, that, on all occasions when the Company have carried goods for the plaintiff, they have dealt with him only, and have refused to recognise any other person either as consignor or consignee. It appears to us, then, that the Company are bound to treat the plaintiff as consignor and consignee for all purposes, in-

cluding the mode of charging in the aggregate, and that they have no right to make a distinction in that respect between him and any other individual member of the public. Of the sum constituting this third head of claim, it appears that a small portion, 17*l.* 5*s.* 5*d.*, would not have been charged had he disclosed the names of the consignors and consignees of the goods; but we find nothing in the statute requiring him to make such disclosure; and the Company had no right to withhold from him, in consequence of his refusal to make it, any allowance to which he would have been otherwise entitled.

Upon the whole, then, it appears to us that the Company had no right to enforce from the plaintiff payment of any of the sums of money which constitute the three heads of claim set forth in the case.

But it remains to be considered whether the money so paid can be recovered by the plaintiff in this action.

It was argued for the defendants that it cannot, for that the payments were made voluntarily, with a full knowledge of all the circumstances; and that the plaintiff was not compelled to make those payments, but in each case must be considered as having made a contract with the Company to pay them a certain sum of money as the consideration for the carriage of his goods; and that, having made such contracts, he cannot now retract, and recover the money paid in pursuance of them. In support of this argument, *Knibbs v. Hall* (a), *Brown v. M'Kinally* (b), *Bilbie v. Lumley* (c), and *Brisbane v. Dacres* (d) were cited. On the other side, it was urged, that these could not be considered as voluntary payments; that the parties were not on an equal footing; that the defendants would not, until such payments were made, perform that service for the plaintiff which he was entitled by law to receive from them without

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(a) 1 E.p. 84.

(b) *Id.* 279.

(c) 2 East, 469.

(d) 5 Taunt. 143.

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making such payments; and that, consequently, he was acting under coercion: and in support of this view of the case, *Dew v. Parsons* (a), *Morgan v. Palmer* (b), and *Waterhouse v. Keen* (c) were referred to.

We are of opinion that the payments were not voluntary. They were made in order to induce the Company to do that which they were bound to do without them, and for the refusal to do which an action on the case might have been maintained, as was expressly decided in the case of *Pickford v. The Grand Junction Railway Company* (d). And in this respect the case very much resembles that of — *v. Pigott*, mentioned by Lord *Kenyon* in *Cartwright v. Rowley* (e). That was an action brought to recover back money paid to the steward of a manor, for producing at a trial some deeds and court-rolls, for which he had charged extravagantly. The objection was taken, that the money had been voluntarily paid, and so could not be recovered back again; but, it appearing that the party could not do without the deeds, so that the money was paid through necessity and the urgency of the case, it was held to be recoverable. We think the principle upon which that decision proceeded is a sound one, and strictly applicable in the present case; and that the defendants cannot, by the assistance of that rule of law on which they relied, retain the money which they have improperly received.

Upon the whole case, therefore, we think the verdict should stand for the plaintiff, as it is at present.

Rule accordingly (f).

(a) 2 B. & A. 562.

(b) 2 B. & C. 729; 4 D. & R. 283.

(c) 4 B. & C. 200; 6 D. & R. 257.

(d) Antè, p. 193; 10 Mee. & W.

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(e) 2 Esp. 723.

(f) See *Regina v. The Leicestershire and Northamptonshire Union Canal Company*, antè, p. 1.

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BEFORE V. C. KNIGHT BRUCE.

THE GREAT NORTH OF ENGLAND, CLARENCE, AND HARTLEPOOL JUNCTION RAILWAY COMPANY v. THE CLARENCE RAILWAY COMPANY.

Nov. 13th.
Dec. 3rd & 13th.
1845.
Jan. 20th &
26th.

BILL, filed on the 2nd November, 1844, stated (among other things) the incorporation of the plaintiffs by act of Parliament (7 Will. 4 & 1 Vict. c. xcv) (a), and that the necessary sums required for constructing the railway had been subscribed for, and that in 1841 the works were in a state of advancement.

The plaintiffs, being obliged, in order to carry out the purposes of their act, to cross the defendants' railway, and having, under their original act, only a

power to cross with the consent of the defendants, applied to Parliament for another act to enable them to build a bridge over the defendants' railway without such consent. The second act gave the plaintiffs power to build such bridge, provided that the width between the abutments thereof should not be less than twenty-six feet, measuring the same in a line at right angles to the defendants' railway, and that no part of the under side of the soffit of the bridge should come within sixteen feet of the surface of defendants' railway; and provided that such bridge should be constructed of such materials and in such manner as should be agreed upon between plaintiffs' engineer and the engineer of the defendants' railway: and in case the defendants' engineer should not, within three weeks after the plaintiffs' engineer should have submitted to him a plan of the proposed bridge, signify his assent thereto, then it should be referred to the surveyor of bridges for the county, whose decision should be binding and conclusive on all parties.

The defendants' engineer not having given his assent to the plan submitted by the plaintiffs' engineer within three weeks, the plaintiffs submitted their plan to the county surveyor, who made his award, with a plan, from which it appeared that the abutments of the proposed bridge must necessarily rest on the defendants' land on each side of their rails.

The defendants prevented the plaintiffs from building their bridge according to this plan, whereupon they purchased land upon which to build the abutments, and submitted a new plan to the defendants' engineer. No notice having been taken of this new plan, the plaintiffs referred it to the county surveyor, and a day was fixed for proceeding on the reference. The defendants did not attend the reference, but built up walls which rendered it impossible for the plaintiffs to erect their bridge; whereupon they filed a bill, praying an injunction which would, in effect, be mandatory, and compel the defendants to pull down their walls, and withdraw all obstructions to the plaintiffs' proceeding in their works.

On a case sent for their opinion, the Court of Exchequer decided as follows:—

1. That the plaintiffs had no right, without the consent of the defendants, to construct the bridge according to the first award of the county surveyor. 2. That, as he had no power to direct a bridge to be built upon land without the consent of the owner, his first award was not binding, and he was at liberty to make another. 3. That the abandonment by the plaintiffs of the first award did not operate as a release of their right to build a bridge over the railway. 4. That they had a right to place temporary scaffolding &c. on the land of the defendants, if necessary for the construction of the bridge.

A Court of law having decided the legal right in favour of the plaintiffs, the Vice-Chancellor accordingly granted the injunction sought by the bill, with a proviso, that it should be exercised *bonâ fide*, and so as not at any time or in any manner to obstruct or interfere with the traffic of the railway.

(a) See *antè*, vol. 2, pp. 764, 768, where the material sections are set out.

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That the defendants were incorporated by act of Parliament (9 Geo. 4, c. lxi) (a), and their powers enlarged by certain other acts (b); and they claimed to be the owners of the Clarence Railway and of certain branch railways, and in particular of the Byers Green Branch and Sherburn Branch Railways.

That, in the beginning of 1841, plaintiffs' works for making their railway had approached near to the Sherburn branch of the Clarence Railway, from the east side thereof, in order to connect their railway with the Great North of England Railway and the Byers Green Branch Railway on the west side of the Sherburn Branch Railway.

That the defendants refused to consent to the plaintiffs' railway being carried across the Sherburn Branch Railway, and divers proceedings were taken at law and in equity to determine the right of the plaintiffs to cross the defendants' railway (c); but it was found impossible to complete the railway within the time specified by the first act of Parliament, and, by a certain other act (5 & 6 Vict. c. xvii), the time was extended for five years.

That, by a certain other act of Parliament (6 & 7 Vict. c. lxxxii), intituled "An Act to enable the Great North of England, Clarence, and Hartlepool Junction Railway Company to make a branch railway, and to explain and amend the acts relating to the said railway, and for other purposes," it was, among other things, enacted, by the 9th section, that all the provisions, matters, and things contained in the former acts (therein recited) (except such of them as were by the said act or by any statute of the realm repealed, altered, or otherwise provided for) should operate and be in force in respect of the purposes of the act as effectually as if the same provisions, matters, and things were re-enacted in the act in reference to such purposes;

(a) See *antè*, vol. 2, p. 763.

(b) 10 Geo. 4, c. cvi; 2 & 3 Will. 4, c. xxv; 3 & 4 Will. 4, cc. iv &

xcv; 7 Will. 4 & 1 Vict. c. ciii; 6 & 7 Vict. c. xli.

(c) See *antè*, p. 426.

and that it should be lawful for the said Great North of England, Clarence, and Hartlepool Junction Railway Company to make a branch railway, with all proper works and conveniences connected therewith, to commence on the west side of the Sherburn branch of the Clarence Railway, in a field belonging to the Rev. R. H. W., and to terminate by a junction with the Byers Green branch of the Clarence Railway.

By the 20th section of this act, after reciting, that said Great North of England, Clarence, and Hartlepool Railway Company were authorised by the therein first-recited act (7 Will. 4 & 1 Vict. c. xcv) to carry their said railway across the line of the Clarence Railway upon the level, providing the consent in writing of the Company of proprietors of said Clarence Railway could have been for that purpose first had and obtained by the said Great North of England, Clarence, and Hartlepool Junction Railway Company; and thence to communicate or form a junction with the intended line of the Great North of England or Newcastle and Darlington Junction Railway: and after reciting, that the branch railway, by the act authorised to be made, was intended to be carried across the said line of said Great North of England or Newcastle and Darlington Junction Railway, and was to form a junction with the Byers Green branch of the Clarence Railway, as defined upon the plans and sections thereof: and after reciting, that plans and sections, upon which the intended line or course and levels of said thereinbefore-mentioned portion of the railway by said act authorised to be made as aforesaid were defined, were deposited with the clerk of the peace of the county of Durham in November then last: and after also reciting, that it was expedient that said thereinbefore-mentioned portion of said railway should be carried over the line of said Clarence Railway by means of a bridge, instead of on the level, as contemplated by said first-recited act: it was enacted, that, notwithstanding anything in said

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first-recited act contained, it should be lawful for said Great North of England, Clarence, and Hartlepool Junction Railway Company to construct and carry the thereinbefore-mentioned portion of the railway, by said act authorised to be made across the Clarence Railway, by means of a bridge, as thereafter mentioned, in the line or course defined upon the plans; and also to carry and construct the branch railway, by the act authorised to be made, across the intended line of the Great North of England Railway, and to form a junction with the Byers Green branch of the Clarence Railway in the line or course and in the manner defined upon the plans and sections thereof referred to in the act, or within the limits of deviation by the act authorised, without its being necessary for the Great North of England, Clarence, and Hartlepool Junction Railway, to obtain the consent in writing or otherwise of the owners of the said Clarence Railway and of said line of the Great North of England Railway.

By the 21st section of this act, after reciting, that, for the purpose of carrying the railway over the Clarence Railway, the Great North of England, Clarence, and Hartlepool Junction Railway Company should, and they were thereby required to construct and for ever maintain a good and sufficient bridge over the Clarence Railway, and that the width of such bridge between the abutments thereof should not be less than twenty-six feet, measuring the same in a line at right angles, or as near as might be, with the line of deviation of the Clarence Railway; and that no part of the under side of the soffit of the bridge should come within sixteen feet of the surface of the rails of the Sherburn branch of the Clarence Railway: it was provided, that the said bridge should be constructed of such materials and in such manner as should be agreed upon between the engineer for the time being of the Great North of England, Clarence, and Hartlepool Junction Railway Company, and the engineer for the time

being of the said Clarence Railway; and in case the engineer for the time being of the Clarence Railway Company should not, within three weeks after the engineer of the Great North of England, Clarence, and Hartlepool Junction Railway Company should have submitted to him a plan of the proposed bridge, signify in writing his assent thereto, then the materials of which, and the manner in which said bridge should be constructed, should be referred to the surveyor of bridges for the county of Durham for the time being, whose decision should be binding and conclusive upon all parties.

On the 15th of September, 1843, the plaintiffs' engineer delivered to the defendants' engineer a plan of a bridge proposed to be erected, which was duly transmitted to the committee of the Clarence Railway Company, by whose direction, on the 4th of October, a letter was sent to plaintiffs' engineer, informing him that they "required the Clarence Railway to be crossed by a bridge having a brick or stone arch."

That, as the defendants' engineer had not signified his assent to the plan within three weeks, as mentioned in the act, the plaintiffs' engineer attended at the office of the county surveyor, and delivered to him the plan which had been returned, and requested him to take upon himself the burden of the reference with respect to the bridge.

On the 23rd of November, the county surveyor made his award, to which a plan was annexed, whereby it appeared, that the width of such intended bridge between the abutments thereof was twenty-six feet, and no more, and was designed to cross the Clarence Railway so as to leave an equal space on each side of the rails of such railway between the rails and the abutments of said bridge; and the width of the land belonging to the defendants, at the place where said bridge was thereby designed to cross, measured at right angles to the line of the Clarence Railway, was forty-seven feet, or thereabouts; and therefore it appeared

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upon the plan, by reference to the dimensions of the bridge and railway and the defendants' land, that the proposed bridge could not be constructed in accordance with the plan, unless the abutments thereof were allowed to rest and be built on the land of the said defendants, on each side of the rails of the Clarence Railway.

That the plaintiffs commenced their works, but were prevented from continuing them by the threats and assaults of the defendants' servants, who filled up the plaintiffs' excavations as soon as they had made them.

The defendants refused to treat for compensation for the use of their land by the plaintiffs, and addressed to them a letter, which was in part as follows:—"The Clarence Railway Company consider they have been very ill treated by the clandestine and uncandid proceedings of your clients, who, judging from the papers recently left by you with the Clarence Railway committee, seem to have obtained an alleged award from Mr. Bonomi, and then to have suppressed it for about three months. The Clarence Railway Company are completely taken by surprise by this alleged award, and they cannot in any way recognise the validity of it. Indeed, it appears wholly unintelligible; and, no width or height of the proposed bridge being given, it is impossible to ascertain the proportions. The Great North of England, Clarence, and Hartlepool Junction Railway Company, and all other parties concerned, will be pleased to take notice, that the Clarence Railway Company will hold them trespassers, if they enter the land of the Clarence Railway Company; and that the Clarence Railway Company consider all the proceedings connected with the alleged award, irregular, void, and unjustifiable."

The plaintiffs, finding it impossible to build the bridge according to the award and plan of the 23rd of November, 1843, entered into an agreement with the owner of the adjoining land for the purchase of so much thereof on each

side of the Clarence Railway as would be sufficient for the site of the abutments of a bridge, and gave notice to the defendants, to the effect that plaintiffs intended to abandon; and did accordingly abandon and relinquish their intention and right to build or construct a bridge according to the plan of the 23rd of November; and did also abandon and relinquish all right, title, interest, and privilege which might accrue to plaintiffs under the said plan and decision, and thenceforth would not recognise or rely on the same, but would treat the same as absolutely null and void, and of no effect; and that their engineer would, on or after the 4th of May then next, deliver to defendants' engineer the plan of a bridge to be constructed by plaintiffs over the Sherburne Branch Railway, pursuant to their act.

In reply to this notice, the defendants' solicitors wrote to the plaintiffs, intimating that they did not acquiesce in the course adopted by the plaintiffs.

On the 9th of May, the engineer of the plaintiffs delivered to the defendants' engineer the plan of a bridge intended to be erected by plaintiffs in lieu of the one proposed by the former plan, and requested him to appoint an early day for discussing and explaining the plan, and expressing his assent to or dissent from the same. And on the same day the plaintiffs served on the defendants' engineer a notice to the effect, that, if the defendants' engineer did not, within three weeks from the date of the delivery of the plan, signify his assent in writing thereto, the materials of and the manner in which the said bridge should be constructed would be referred to the county surveyor, pursuant to the provisions of their act.

To this notice the defendants sent a counter-notice, dated the 13th of May, under their common seal, whereby they stated that they did not admit that the plaintiffs were justified in abandoning the award of the 23rd

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of November, 1843, and further said, " We hereby protest against your adopting the course intimated to us by that notice. We are advised, and hereby give you notice, that, pursuant to the provisions of the act of Parliament mentioned in your said notice, it is your bounden duty, if you are aware that such alleged award or decision has been clandestinely or otherwise improperly obtained by you, or is in other respects defective or insufficient, to take the proper steps for setting aside the said award or decision, if the same can be set aside by proper proceedings in a Court of equity, &c. And we hereby give you notice, that we do not in any manner admit that you have any right (inasmuch as you assert or imply in your said notice that such an award or decision has been already made under the hand and seal of the said I. Bonomi (the county surveyor) touching a bridge proposed to be erected or constructed by you over and across the Sherburn branch of our railway), to obtain any other award or decision from the surveyor of bridges for the county of Durham, as to the materials of which, and in the manner in which, the bridge in question shall be constructed. And we also give you notice, that you are not to construe any of the acts of ourselves, our servants or agents, as implying on our part any admission of, or acquiescence in, your right to obtain any other award or decision," &c. " We hereby give you further notice, that, if you proceed nevertheless to obtain such award or decision, we shall not consider ourselves bound to obey, or in any way to submit to, either the said award or decision alleged by you to have been already made by the said I. B., or such other award or decision as we suppose from your said notice you are seeking to obtain."

The defendants not having taken any notice of the last plan submitted to them, the plaintiffs' engineer, on the 9th of May, requested the county surveyor to take upon him-

self the burden of the reference, with respect to the materials of which, and the manner in which, the bridge indicated by the last plan should be built.

The defendants, by letter, protested against the plaintiffs' proceedings, but, on the 20th June, the county surveyor gave notice, appointing the 1st of July for proceeding upon the reference. Immediately after the receipt of this notice, the defendants erected a wooden building about fifteen feet high in the line of the intended bridge, and, in reply to the former notice, caused a notice on the 28th of June to be served on I. B., (the county surveyor), to the effect, that, it being alleged that he had already made a decision on the 23rd of November, 1843, and no proper steps having been taken to set aside the same, the defendants protested against his proceeding to make any other decision in the premises; and that, if any such other should be made, the defendants would not submit thereto, and would hold I. B. liable for all losses, costs, and expenses arising from such other decision, and would hold all parties entering upon the property of the defendants, with reference to any further decision, as trespassers.

That no person on the part of the defendants attended at the time or place appointed by the notice, but on the 5th of July, the defendants commenced building a house in the intended line of the bridge, but were compelled by the provisions of their act (10 Geo. 4, c. cvi), to desist therefrom, and in lieu thereof built up a wall on each side of the rails, in the line of the intended bridge, nine yards in length and eight yards in height, the effect of which was to prevent the plaintiffs from building their bridge according to the second plan, without previously removing the walls or considerably reducing the height thereof.

On the 31st of July, I. B. made his award, which, among other things, directed that the pillars or abutments of the bridge should be built close adjoining to the

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boundary of the Sherburn Branch Railway, on the land of the Rev. H. W., and contained a specification for the building the bridge.

In the following month the plaintiffs tendered the defendants £20 for their costs in relation to the reference, and also in full for all expenses which might be occasioned to the defendants by the obstruction of the Sherburn Branch Railway, or the traffic thereon, or any damage which might arise in consequence of the temporary use or obstruction thereof, by plaintiffs, their servants, &c., for the purpose of erecting their bridge; but this tender was refused.

The plaintiffs commenced the masonry of their bridge according to the last decision, and outside the walls built up by the defendants; and, by their solicitors, sent a letter to the defendants, requiring them, on or before the 3rd of September, to pull down or remove so much of the walls as exceeded sixteen feet in height above their railway; but the defendants, by letter, refused to comply with the plaintiffs' request, and denied their right to cross their line by means of a bridge in the manner threatened, and expressed their intention to resist any attempt on the part of the plaintiffs to effect that object to the utmost limit allowed by law, and to apply for legal redress, and, for that purpose, to bring the matter before a Court of Chancery.

That the defendants, on the 2nd September, filed their bill, and thereby prayed, amongst other things, that plaintiffs might be restrained by injunction from making and constructing any bridge over the Sherburn branch of the Clarence Railway at the place or places where the works of plaintiffs were then carried on, for the purpose of constructing a bridge, and from making any entry upon the Sherburn Branch Railway, and the land immediately adjoining, described in the plan annexed by way of schedule to said bill, or any part thereof, in order to construct and form

any bridge whatever over the same, and from knocking down or in any way injuring or defacing the two brick fence walls, or either of them, so built up by the defendants, or any part thereof, and from taking any other proceeding for the purpose of constructing and forming any bridge whatever over the same; or that plaintiffs might be so restrained in manner aforesaid until it had been ascertained, by and under the decree and direction of this Court, whether said first award or decision of the 23rd of November, 1843, was valid or invalid, and (in the event of the same being invalid) until the same had been properly set aside.

That said defendants, on 9th September, 1844, moved for an injunction accordingly; whereupon the Court ordered that a case should be stated for the opinion of the Court of Exchequer (a); and plaintiffs by their counsel consenting, and without prejudice to any question between the parties, the Court was pleased to declare plaintiffs, the Great North of England, Clarence, and Hartlepool Junction Railway Company, liable in the suit to make to the defendants compensation in respect of such (if any) wrong as the plaintiffs should do or cause to be done to the defendants in any respect or respects in the bill mentioned, and liable also to be ordered in said suit to take away and remove any work or works, erection or erections, which the said Court should adjudge to have been wrongfully made or done by them; and after the Barons of the Court of Exchequer should have made their certificate, such further order should be made as should be just. And it was ordered, that the application in all other respects should stand over, with liberty to apply, &c.

That the plaintiffs, hearing of the intention of the defendants, by means of their locomotives and by main force, to resist any attempt of the plaintiffs to carry

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(a) See p. 624, post.

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their works across their line, caused their solicitors to write a letter to them to ascertain their intentions, and, in reply to such letter, the defendants, by their solicitors, sent a letter to the plaintiffs, to the effect, that the order in the defendants' cause was not intended to interfere with their legal rights in any way, and that it would be a most unjust, vexatious, and, at the same time, a fruitless proceeding on the part of the plaintiffs, if they were to attempt to invade the plaintiffs' property, and that it was their intention in every legal manner to maintain their strict legal rights.

That the defendants had raised their abutments to such an height that it was necessary and proper in the prosecution of their work to throw a platform across the defendants' railway; but by reason of the defendants' walls exceeding sixteen feet above the surface of the rails, it would be impossible to lay down the platform or construct the bridge according to the award of the 31st of July, 1844, and that, in order to carry on their works, it would be necessary for the servants, &c. of plaintiffs to cross and recross the defendants' rails, and also temporarily to rest upon the sides or slopes of the line, and also to pass ropes and blocks for hauling beams into their places.

That the works might and would be carried on at such times and in such manner as not to interfere with the traffic.

The bill contained, among other charges, the following: that the plaintiffs were entitled, by their engineer, agents, &c., to enter into and upon the defendants' railway, and temporarily to use the same, so far as such temporary use was necessary and indispensable for constructing their bridge, upon making satisfaction for any temporary injury, as they had offered and were at all times ready and desirous to do; and that the object of the defendants was to delay the plaintiffs in completing their junction railway, or forming a junction between the same and the Great

North of England Railway, and between the same and the Byers Green branch of the defendants' railway for an indefinite period, and thereby prevent plaintiffs from deriving any profit or return during such period for the large sums they had expended; and that the loss or damage which would be occasioned by such delay would be very great and could not be ascertained, and would be irremediable.

That the completion of the Junction Railway, and the junction thereof with the Byers Green branch of the Clarence Railway, would afford a much shorter and more convenient line of transit than then existed for the traffic coming from places westward of the point of junction, and proceeding to Hartlepool or vice versâ, which traffic was then carried on by a circuitous route; and that the completion of the plaintiffs' railway would be of great benefit to the public.

The bill then prayed that the defendants, by themselves, their agents, &c., might be restrained by injunction from interfering with, or obstructing, hindering, or preventing the plaintiffs, their servants, &c., from making and constructing the said bridge across and over the Sherburn Branch of the Clarence Railway, in the line or course prescribed by the stat. 6 & 7 Vict. c. lxxxii, and of the materials and in the manner specified and directed by the said decision of the surveyor of bridges for the county of Durham, of the 31st of July, 1844, and the plan thereto annexed; and might in like manner be restrained from continuing to maintain or uphold the said walls erected by the defendants, or any other walls or wall, &c., whereby the plaintiffs, their servants, &c., might be prevented from constructing the said platform, and from making the same of the materials and in the manner specified and directed in the last-mentioned decision, in the line or course aforesaid, and from making or erecting any other walls or wall, places, &c., on either side of the said railway, to a greater height than sixteen feet above the surface of

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the rails of the Sherburn branch, and from pulling down, taking up, or removing any scaffolding or other works or materials to be made, deposited, or laid down by the plaintiffs, their servants, &c., on the sides or slopes of the said Sherburn Branch Railway, for the purpose of making or constructing the same bridge, and from preventing or hindering the agents and servants, &c. of the plaintiffs from passing across the last-mentioned railway at proper and reasonable times during the progress of the said works, for the purposes thereof, and taking down or removing, if necessary, any such walls, &c., and from otherwise impeding or delaying plaintiffs in making the said bridge; the plaintiffs undertaking, during the progress of the said works, and every of them, not in any manner to interfere with or obstruct the traffic upon the Clarence Railway, and not in any respect to injure or damage the Clarence Railway or the works thereof, and undertaking to make and pay satisfaction to the defendants for any injury or damage which might be sustained by the defendants, by or from any temporary use of their land on the sides or slopes of their said railway. And the bill also prayed, that the defendants might be ordered to pay the costs of the suit.

A motion, supported by affidavits, was now made for an injunction, pursuant to the prayer of the bill.

Mr. *Wigram* and Mr. *Hare*, in support of the motion.—The plaintiffs have, under their act 6 & 7 Vict., a clear right to build the bridge compulsorily as against the defendants; and when the Legislature gave them that power, it also gave them all other powers necessary to the carrying out the intention of the act. The crossing the defendants' railway is absolutely necessary for the construction of the bridge; and, unless the walls and obstructions raised by the defendants are removed, the power given by the act is nugatory. If the permission of the defendants is now

necessary to enable the plaintiffs to complete their bridge, the only object of applying to Parliament is done away with. Where power to mine is given, there also a power to enter the land for the purpose of mining is inferred by the Court. (See *Jarman's Conveyancing*, by Sweet, Vol. 4, p. 669, note). The Court is in the habit of granting injunctions of this nature, which are, in effect, mandatory. *Robinson v. Lord Byron* (a).

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Mr. *J. Russell* and Mr. *Collins*, for the defendants, contended, that, if the plaintiffs had a right to build a bridge, that right was dependent upon the award required by the act. The award of Mr. *Bonomi* was not in accordance with the act, and by that non-compliance all the right of the plaintiffs was exhausted (b).

[The Court suggested that the defendants should give an undertaking to satisfy all damage arising to the plaintiffs from the delay of their works, if the legal question should be determined against them; but this they declined to do.]

The VICE-CHANCELLOR.—The case which, in the suit between the present defendants as plaintiffs, and the present plaintiffs as defendants, I directed during the last vacation, has not, it appears, been yet argued, or even prepared; though, with a view to facilitate the disposal of it during Michaelmas Term, I stated in the vacation to the counsel and solicitors my willingness to settle it myself without the aid of the Master's Office. I do not doubt that the case might have been settled and argued before the present time, had either party so wished. The actual position of that matter, and the undertaking into

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(a) 1 Bro. C. C. 588.

(b) The rest of the argument is noticed in the judgment.

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which in that suit the plaintiffs in this suit have entered, may be thought not altogether immaterial to the present motion. When the order for a case was made by me, and the undertaking by the present plaintiffs was given, the present suit had not been commenced, the object of which, and of the motion now before me, is, substantially, that the present plaintiffs may be permitted to erect a bridge across the railway of the defendants agreeably to the plan secondly approved by Mr. Bonomi, the surveyor of bridges for the county of Durham. The present plaintiffs desire not to acquire the ownership, nor to become permanently either possessors or occupiers of any part of the soil belonging to the present defendants, but merely, and without impeding at any time, or interfering for a moment with, their traffic, or the free and continual passage of engines and carriages upon their railway, to be allowed to have, during the erection of the proposed bridge across it, (of which not any part is to be built or rest on their soil), such use of the soil adjoining the line of the railway, by way of temporary easement, and such power for the workmen employed to pass over it from side to side, also by way of temporary easement, as may be necessary for erecting the bridge with reasonable convenience, they receiving a fair compensation for the damage (if any) that may be thus done to their soil. That this damage must, at the utmost, be very slight, is perfectly plain. That, on the other hand, the obstruction and delay occasioned by their refusal, and actual course of conduct, is likely to create serious prejudice and loss to the present plaintiffs, cannot be doubted, in respect of which, if wrongfully caused by those conducting the affairs of the present defendants, (a corporation aggregate), the legal liability of the corporation, or its power, in point of means, to make compensation to the present plaintiffs, may not be clear, nor can it be questioned that time is of considerable consequence in this matter. Under all the

circumstances to which I have referred, I consider myself bound to express, in the present position of the parties, an opinion upon the points of law that have been raised, notwithstanding the case directed in the other cause has not yet been argued.

It is, and has ever been, the contention of the present defendants, that Mr. Bonomi, in opposing the plan which he first approved, acted erroneously, by exceeding his powers. To this the present plaintiffs have submitted; it being not by their act, but by the wish and conduct of their opponents, that Mr. Bonomi's first plan has been relinquished and abandoned. The second plan of Mr. Bonomi, (whose integrity has not been questioned), has not been substantially, nor could it, I think, have been disputed by the present defendants, except on the ground, that, as they contend, he was *functus officio* by having approved the first plan, and had, therefore, neither jurisdiction nor power to approve the second. Is then this ground tenable?—Whether, in the ordinary case of a private referee, who makes an award set aside by a Court on grounds not impeaching his integrity, he can, without consent, (the time limited, if any, not having expired), make another award, is a question upon which I need not give any opinion. The present is not that case, and it seems to me, upon the act in question, of 6 & 7 Vict., that, as against the present defendants, who denied the validity of the first plan, it was competent to Mr. Bonomi after that denial (giving, as he appears to have done, sufficient notice to both parties) to proceed, at the request of the present plaintiffs, to approve of a second plan as he did, and my impression in this particular case, having regard to the language of the act and the conduct of the present defendants, is, that the second plan is as valid and effectual against them as if the first plan had not existed, and is consequently good against them. Then, if so, are the present plaintiffs, according to a reasonable interpretation of the act, and to legal principles, entitled

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temporarily, that is, during the work of constructing the bridge, to those easements upon the soil of the present defendants which are necessary to enable its construction with reasonable convenience, so far as they can be exercised without obstructing or interfering at any time or in any manner with the traffic or free passage of engines and carriages upon the railway? I am of opinion that the present plaintiffs are so entitled. This latter point has not been proposed to be submitted to a Court of law. Perhaps I should have been willing to do so, had it been suggested to me in the other cause, that such a point arose or might arise; but no such suggestion was made.

It has been said that the injunction now sought is wholly mandatory, and therefore proper to be refused. That injunctions, in substance mandatory, though in form merely prohibitory, have been and may be granted by the Court, is clear. This branch of its jurisdiction may be one not fit to be exercised without particular caution, but certainly it is one fit and necessary under certain circumstances to be exercised. Under what circumstances it should be exercised must be matter for judicial discretion in each several case.

It is also said, that to assist the present plaintiffs on this motion will be to give them possession of land in dispute, pending a litigation, by evicting defendants in possession for that purpose. I think that an over-statement. The present plaintiffs claim to use or touch the defendants' soil only by way of temporary easement. A case may well be conceived in which an injunction ought, upon proper terms, to be granted interlocutorily to a plaintiff claiming a right of way over the land of a defendant denying the right and obstructing the path. Cases as to water and light may be more frequent, but differ in principle little, if at all. But it is true that here the plaintiffs have never been in possession of the easement claimed; and whether the other facts before me, the act of Parlia-

ment, my view of its meaning, and my impression as to law, ought, countervailing that circumstance, to induce this Court, pending the case directed to the Court of Exchequer, to interfere on the present occasion, taking care to secure, as far as may be essential, justice to both parties, I have doubted, and, as I continue to doubt, will further consider.

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The VICE-CHANCELLOR.—Upon the plaintiffs' motion, heard during the term, the defendants having declined to give an undertaking that had been suggested, I thought it right to state my opinion as to some points of law raised in this cause, notwithstanding that the case directed in the other cause between those parties to the Court of Exchequer had not been argued. This I did in the course of last week, reserving for further consideration the question, whether, in the present position of the two causes, I could grant the plaintiffs an injunction against the defendants under such terms and qualifications as should secure the defendants against any obstruction or interruption of their traffic or business against serious and substantial damage, against permanent damage of any kind, and against all chance of not being fully compensated for any damage whatsoever. Viewing the matter in contest as I do, I have no hesitation in saying I wished to find myself able to think it right that I should interpose, even as the causes now stand. But I have not succeeded in persuading myself to take this step, considering that the plaintiffs have never been in possession (so far as that expression is applicable) of any part of the easements which they claim—that the questions in dispute are merely legal, and that the defendants deny the plaintiffs' legal right on grounds which, though they may be, as they appear to me to be, untenable, I cannot pronounce to be merely frivolous.

Considering the pendency of the case directed to the Court of Exchequer, (as to which neither party seems to me to have been active,) and the nature of the injunction, which

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alone could be useful to the plaintiffs, I think I should be going to a greater extent than, as far as I am aware, the Court has hitherto gone; and, in effect, be taking what might, perhaps, properly be deemed a new step of some importance, by now interposing. Therefore, without saying that the Court ought not now to interpose, it is, I think, safe and better that the step should be taken, if at all, by the head of it. But I do not refuse this motion. I direct it to stand over, and I give leave, so far as I can give leave, to either party, to apply to the Lord Chancellor to hear it himself, without any fresh notice, if his Lordship shall think fit.

In consequence of these last observations an application was made to the Lord Chancellor on the part of the plaintiffs, when his Lordship recommended the parties to proceed to law, and on the 17th December, 1844, an order was made in both suits that a case should be stated for the opinion of the Court of Exchequer upon the legal rights of the parties. It was declared by the order that the statements of fact contained in the case were to be without prejudice to any questions arising in these suits. And it was ordered that the motion in the second cause should stand over until after the certificate of the Court of Exchequer should be obtained. With liberty to either party to apply.

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A special case, stating the above facts, was accordingly sent to the Court of Exchequer, and came on for argument on the 20th of January, 1845, before *Pollock*, C. B., *Parke*, and *Alderson*, Bs.

The questions submitted to the Court of Exchequer were as follows:—"1st. Whether the Junction Railway Company have a right in law, without the consent of the Clarence Railway Company, to make and construct across the Clarence Railway a bridge according to the first-mentioned

award, determination, or decision of Ignatius Bonomi, dated the 23rd November, 1843, and the plan thereto annexed, upon the site, and in the manner purporting to be authorised thereby. 2ndly. Whether, if the Junction Railway Company have such right, the Clarence Railway Company are entitled to any and what payment or compensation for their land, or the use of their land to be used for that purpose, and by what means to be ascertained. 3rdly. Whether the Junction Railway Company have a right in law, without the consent of the Clarence Railway Company, to make and construct a bridge across the Clarence Railway, according to the design and in the manner purporting to be authorised by the second award, determination, or decision of the said Ignatius Bonomi, and the plan thereto annexed. 4thly. Whether, supposing the said question to be answered in the affirmative, and supposing the Junction Railway Company to be willing and desirous to construct the bridge mentioned in that question, at a reasonable expense and with reasonable convenience, without building upon any part of the soil of the Clarence Railway Company, and (subject as after-mentioned) to be able to do so, but supposing it to be impossible for them to construct it at a reasonable expense or with reasonable convenience, unless during and for the purposes of the work it shall be allowed to them temporarily to place and rest scaffolding poles upon the soil of the Clarence Railway Company, that is to say, upon the strips adjoining the line of their railway, without, however, touching the line of the Clarence Railway, and also be allowed to the workmen of the Junction Railway Company to be employed in the work to cross the line of the Clarence Railway from time to time from side to side, the said Clarence Railway Company are or will be entitled by law to hinder and prevent such scaffolding poles from being so placed or rested, and to hinder and prevent such workmen from crossing as aforesaid, it being understood and assumed that the Junction Railway Company

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and their agents, servants, and workmen respectively intend not to do any vexatious acts, or any act not necessary for erecting and completing the bridge in question in a reasonable and proper manner, and will not prolong the work unnecessarily, and will not obstruct, interrupt, delay, or interfere with the traffic or free passage of or upon or along the line of the railway of the Clarence Railway Company or any part thereof, and will make to the Clarence Railway Company a reasonable compensation for all such use of their soil as mentioned in this question, and will, at the end of the work, if required by them, restore the same to its previous state.

The points marked for argument for the plaintiffs were, 1st, that the 6 & 7 Vict. c. lxxxii (a), is merely a permissive act, with regard to so much of it as relates to the carrying the Junction Railway over the Clarence Railway by means of a bridge, and that, consequently, no bridge can be made by the Junction Railway Company across the Clarence Railway without the previous consent in writing of the Clarence Railway Company having been obtained, pursuant to the 4th section of the 7 Will. 4 & 1 Vict. c. xcv (b); 2ndly, that the Junction Railway Company cannot erect a bridge according to the *first* decision of Mr. Bonomi, without first obtaining the consent in writing of the Clarence Railway Company; 3rdly, that the power of the said Mr. Bonomi was so far exhausted by his first decision, that he had no power to make a second decision in the manner stated in the case; 4thly, that the Junction Railway Company have released their right to cross the Clarence Railway, according to the first decision of Mr. Bonomi.

H. Hill, for the plaintiffs, as to the first question, cited *The Clarence Railway Company v. The Great North of England, Clarence, and Hartlepool Junction Railway Com-*

(a) *Anté*, p. 606.

(b) *Anté*, p. 427, n.

pany (a); and, as to the construction of statutes, *Webb v. The Manchester and Leeds Railway Company* (b), *Priestley v. Foulds* (c), *Stourbridge Canal Company v. Wheeley* (d), *Crespigny v. Wittenoom* (e), *Halton v. Cove* (f), *Chapman v. Pickersgill* (g), *Paget v. Foley* (h), and Co. Litt. 79. a.

Tomlinson, for the defendants, having stated that they were willing to agree to the bridge directed in the second instance by Mr. Bonomi, if the Court should be of opinion that they were not entitled to the first, was stopped by the Court.

POLLOCK, C. B.—The first question submitted to us by the case will be answered in the negative. The Junction Railway Company have no right, without the consent of the Clarence Railway Company, to construct a bridge according to the first award of Mr. Bonomi, because that plan of making the bridge involves the taking of land belonging to the Clarence Railway Company; and whatever meaning is to be given to the 20th section of the 6 & 7 Vict. c. lxxxii, there is certainly no clause empowering them to take land in invitum from the Clarence Railway Company. That being so, the second question does not arise. It is useless to inquire as to the mode of compensation for land which the parties have no right to take. With respect to the third question, whether the Junction Railway Company have a right, without the consent of the Clarence Railway Company, to construct a bridge across that railway, according to the second decision of Mr. Bo-

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(a) Antè, p. 426; 4 Q. B. R. antè, vol. 2, p. 443.

55. (d) 2 B. & Ad. 792.

(b) Antè, vol. 1, p. 576. (e) 4 T. R. 793.

(c) Antè, vol. 2, p. 422; 2 M. (f) 1 B. & Ad. 538.

& G. 175; 2 Scott, N. R. 205: and (g) 2 Wils. 145.

see *Barrett v. The Stockton and* (h) 2 B. N. C. 679; 3 Scott,
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nomi, I think they have such power. I assume that the second award was made according to the act of Parliament, and that no objection exists to it except these, namely, first, that the Company have no power, without consent, to make a bridge across the Clarence Railway at all; and, secondly, that the power given by the award has not been duly exercised. As to the first of these questions, it seems to me that, according to its grammatical construction, and using every precision of language, the 20th section of the 6 & 7 Vict. c. lxxxii, expressly and designedly gives to the Junction Railway Company the power of crossing the Clarence Railway by a bridge, without the consent of the Clarence Railway Company, and that it was passed for that purpose. [His Lordship read the 21st section, and proceeded.] It appears to me, that the manner in which all these three crossings and junctions are mentioned,—all blended together in one sentence,—and the manner in which the two latter are connected with the first by the words “and also,” shews clearly that the words “without consent” apply to the whole of them. On this point, therefore, I entertain no doubt, admitting that all the rules of construction referred to by Mr. *Hill* are to govern our decision. The only doubt that can possibly be thrown upon this part of the case arises from the expression “for this purpose.” But it is clear, even according to Mr. *Hill*’s construction, that this must mean the two purposes, of crossing the Great North of England Railway, and of the communication with the Byers Green branch of the Clarence Railway: clearly, therefore, according to his construction, these two things are combined together in that one expression. If so, there is no great violation of the sense or grammar, in uniting in it all the three purposes before mentioned; and looking at the last sentence, which speaks of “such crossings and communications, or junctions respectively” as to be made under the powers and regulations of the former act, except as regards the prior

consent, this appears to me to be not only a reasonable, but almost the necessary construction of the clause. But then, it is said, if the Junction Railway Company have power to cross without consent, it can be done in one way only, namely, in the manner directed by the first award of Mr. Bonomi. I do not accede to that: the case of a private arbitration, where an arbitrator, after publishing one award, has no power to make a second, is not analogous to the present case, where the reference is to the county surveyor, who is called in under the authority of the act of Parliament. Without at present calling in aid the other facts of the case, which shew that each party seems to have repudiated the first award, I think that, inasmuch as that award directed the bridge to be made partly upon the land of the Clarence Railway Company, which was not authorised by the act of Parliament, it was an award *ultra vires*, not within the powers of the act, and therefore no award at all; consequently, Mr. Bonomi had power to make his second award, and to that award I assume that there is no objection. The third question, therefore, is to be answered in the affirmative. Then, if the Junction Railway Company had power to make the bridge, it is clear that they had power to do every thing which was reasonably necessary for that purpose; and, therefore, if it was impossible for them, at a reasonable expense, or with reasonable convenience, to construct the bridge, without placing their scaffolding, &c., on the soil of the Clarence Railway Company, or without their workmen crossing the railway from time to time, they have a right to do so. The fourth question, therefore, must be answered in the negative.

PARKE, B.—I entirely concur with the Lord Chief Baron. The principal question in the case is, whether, after the passing of the second act of Parliament, the Junction Railway Company had the power of crossing the Clarence

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Railway, without the consent of that Company, by means of a bridge. I quite agree in the principles which have been laid down by Mr. *Hill*, founded on the authorities he has referred to, namely, that we must be satisfied that such a power is given by clear and unambiguous words; and here I think it is perfectly clear what was the intent of the Legislature. The 20th section of 6 & 7 Vict. c. lxxxii, in effect recites the decision of the Court of Queen's Bench between these parties, and the difficulty arising therefrom, and then proceeds to enact, that it shall be lawful for the Junction Railway Company to carry their railway across the Clarence Railway by means of a bridge, without its being necessary to obtain for that purpose the consent of the owners of the Clarence Railway. I quite agree in the construction put by my Lord Chief Baron on the words "for that purpose;" at all events, they include more than one purpose. But if, at first sight, they appear to create any difficulty, the concluding words of the section entirely remove that difficulty; they say that all such crossings, communications, and junctions respectively, shall be made and executed under the powers of the first-recited act, except as regards the prior consent of the owners of such railways, and also except as hereinafter provided with respect to the said intended bridge across the Clarence Railway. It is abundantly clear, therefore, that the power of crossing the Clarence Railway by a bridge, without consent, is included in this enactment. I agree, however, that we cannot imply any power of taking the land of the Clarence Company against their consent for the purpose of such bridge. Then, was the first decision of Mr. Bonomi final? I think it certainly was not. It is not like the award of a private arbitrator as to a right of action; it is a mere reference to the county surveyor for his direction as to the mode of constructing the bridge. The Junction Railway Company have a power of crossing by a bridge to be settled in a particular manner by the county surveyor;

and, although it would be vexatious if the mode directed by him were abandoned without cause, they surely have a right to do so when it is found that they cannot carry it into effect without the consent of the Clarence Company, and that consent is refused. The reference having so become abortive, they have a right to apply for a fresh decision. As to the supposed release, it was at most a release only of the right to cross in the particular mode settled by Mr. Bonomi on the first occasion. The second award, therefore, was perfectly valid, and the Junction Railway Company have a right to cross in the mode pointed out therein; and I agree that they have power also for that purpose to fix their scaffolding on the land of the Clarence Company, and to do all other acts which are necessary for the enjoyment of their principal right of crossing, on the principle, that *cuicumque aliquid conceditur, conceditur etiam id, sine quo res ipsa non esse potest*. If compensation be necessary, it is provided for by the 46th section of the former act, which is incorporated into the latter.

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ALDERSON, B.—I am of the same opinion. I think the first award was bad; the bridge therein mentioned was one which the Junction Railway Company had no power to make without the consent of the Clarence Railway Company. If so, Mr. Bonomi was no proper umpire as against the Clarence Company, because he was an umpire only as to bridges which might be made without their consent. The 6 & 7 Vict. c. lxxxii, gave the power of crossing the Clarence Railway without the consent of that Company, but subject, nevertheless, to the 4th section of the 7 Will. 4 & 1 Vict. c. xcv, which prevented the Junction Railway Company from taking the land of any party without his consent. Now, the first award of Mr. Bonomi was, that the abutments of the bridge were to rest upon the land of the Clarence Railway Company, which could not be done without their consent. That award was therefore bad, and

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it was so treated by all parties; for that purpose he was not a legally constituted umpire: but if the bridge could be built without the consent of the Clarence Railway Company for that purpose, he was a properly appointed umpire; and this was the case with respect to his second award. As to the other points in the case, I entirely agree with the rest of the Court.

THE Court of Exchequer accordingly sent their certificate to the Vice-Chancellor, by which they negatived the first question, stated it to be unnecessary to answer the second, answered the third in the affirmative, and the fourth in the negative. On the 26th January, 1845, an order for an injunction was granted in nearly the terms of the prayer of the bill, with a proviso (a), that the injunction was not, nor was that order to be considered as authorising the plaintiffs to do any vexatious act, or any act not necessary for erecting and completing the bridge in a reasonable and proper manner, or to prolong the work unnecessarily, or to obstruct, interfere with, or delay the traffic or free passage of the defendants, their workmen or agents, along their line of railway.

(a) See 10 Ves. 195.

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COURT OF EXCHEQUER CHAMBER.

(In Error).

*In Trinity Vacation, 1842.*THE MANCHESTER AND LEEDS RAILWAY COMPANY
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A WRIT of error, brought by the defendants below on the judgment of the Court of Queen's Bench in this case (*a*), came on for argument on the 20th of June, 1842, before *Tindal, C. J., Coltman and Maule, Js., and Parke, Alderson and Rolfe, Bs.* The cause of error assigned by the plaintiffs in error was, that judgment ought to have been given for them, with costs, notwithstanding the verdict on the issues found for the Crown.

By a Railway Act (6 & 7 Will. 4, c. cxl, s. 94), a Company were empowered generally to divert, raise, sink, or deepen any roads, in order to carry the same over, under, or by the side of the railway, subject to the provisions

and restrictions of the said act. By another act (7 Will. 4 & 1 Vict. c. xxiv), enabling them to vary their line, they were authorized (s. 38) to carry the line of railway across a certain turnpike road, by means of a bridge of the width of 30 feet at the least, and for that purpose to lower the then present bed of the road, provided that, in case it should be expedient to lower the surface of the road for the purposes aforesaid, then it should not be lawful for the Company to lower or alter the present bed of the road, unless the same should be lowered on both sides of such bridge so as to leave a certain inclination, and that the Company should make all new fences, &c., and relay and reform the road.

The Company made a bridge 30 feet wide, over a turnpike road 42 feet wide, consisting of 30 feet carriage way and two footways of 6 feet each. They lowered the carriage way of the road, but left the footways at their original level.

On the trial of certain traverses to a return to a mandamus which had issued to the Company to reform the road, and to lower it the whole width of 42 feet, the jury found—1. That the Company had not so lowered the road. 2. That they had reformed the road, in compliance with the act. 3. That the road so made by the Company was more commodious to the public, than if the whole road had been lowered to the full width of 42 feet.

The Court of Queen's Bench held that the word "road" meant the whole road, including footpaths; and, therefore, that the Company had not reformed the road as required by the act; and that the finding of the jury upon the last issue, as to its being more commodious, was not sufficient to dispense with a compliance with the language and meaning of the act.

On judgment that a peremptory mandamus *non obstante veredicto* should issue and the prosecutors recover their costs,

Held, by the Court of Exchequer Chamber, that it was not a good return to the mandamus that the carriage road and footpath as they now exist are more commodious and convenient to the public, &c., than if lowered as required by the writ.

But *held* (reversing the judgment of the Court of Queen's Bench) that, by the words in the 38th section, "bed of the said turnpike road," the act intended that the carriage road only should be lowered; and that the full breadth of the former carriage road was not intended to be preserved under the bridge, but only as to the part of the road lowered as it descends to the bridge on one side and ascends from it on the other.

(a) *Antd*, vol. 2, p. 711.

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Tomlinson, for the plaintiffs in error, the defendants below, and *Starkie*, contra, in addition to the arguments and cases below, cited *Regina v. The Birmingham and Gloucester Railway Company* (a) and the 2 & 3 Vict. c. lv (b).

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the Court.—(After stating the mandamus, the facts of the case, and the finding of the jury, his Lordship proceeded as follows:—) Upon this state of facts the main question in the case arose, viz., whether the Company were bound by the act of Parliament, referred to in the return, to excavate the road to the full width of the former road. On the part of the prosecutors it was contended, that not only the carriage road but the footpath also ought to be excavated to the full former width of the road; and the judgment of the Queen's Bench is in conformity therewith. The question, so far as this point is concerned, appears to be, whether the expression in the thirty-eighth section of the 7 Will. 4 & 1 Vict. c. xxiv,—“the bed of the said turnpike road”—is confined to that part of the road which in another part of the same section is called the carriage road, or whether it comprises not only the carriage road but the footpath also. And we are of opinion that, looking to the object and purpose for which the bed of the turnpike road is directed to be lowered, the statute intends no more by that expression than the carriage road. That purpose is to enable carriages to pass with perfect safety, by giving them a clear and uninterrupted headway of eighteen feet at the least under the bridge; an object

(a) *Ante*, Vol. 2, p. 694; 2 Q. B. R. 47.

(b) Intituled “An Act for extending and for altering the line of the Manchester and Leeds Railway.”

Sect. 23 empowers the Company, with the consent of the trustees

of any turnpike road, to alter the position or form of any bridge over or under any such road from the position required by former acts or this act, provided that such alterations shall be equally or more convenient to the public.

that is perfectly attainable without making, and is wholly independent of a corresponding alteration in the level of the footway.

But a further question remains—It was urged, that, however the case may be with respect to the footway, the carriage road ought at all events to be lowered to the full width of the former carriage road, which is found by the jury not to have been done. If the section just referred to had contained any express enactment to that effect, it could not be contended that the superior convenience to the public of the road as made would furnish an excuse for a deviation from the express enactment of the statute; but it is admitted that there is no express provision to this effect, nor does it appear to us that there is any sufficient ground for holding that such a provision is to be implied; the expression “unless the same shall be lowered at their own expense on both sides of such bridge,” upon which the Court of Queen’s Bench appears to have placed some reliance, as tending to shew that the whole road was included, appearing to us to apply, not to the right hand side and the left hand side of the bridge as a person passes under it, but to the part of the road lowered as it descends to the bridge on one side and ascends from it on the other.

The Company are undoubtedly bound, in making this alteration, to make it in a manner most convenient to the public. This is required, not only by the nature of the powers confided to them, but by the express condition annexed to the exercise of those powers, by the statute 6 & 7 W. 4, c. cxl, s. 94. That statute authorizes them, amongst other things, to raise or sink any roads or ways, and to do and execute all other matters and things necessary or convenient for constructing the railway and works, doing as little damage as may be in the execution of the several powers granted to them; and, by the subse-

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quent statute, 7 Will. 4 & 1 Vict. c. xxiv, s. 1, those powers are continued and rendered applicable to all the objects of the latter act, but subject to this restriction of consulting, as far as possible, public and private convenience. We see no sufficient reason for implying any condition not expressly required by the terms of the thirty-eighth section.

As to any argument arising from a notion of inconvenience from the mode in which the works have been performed, that matter is concluded by the finding of the jury, which is full and explicit on the point.

Upon the whole, therefore, we think the judgment of the Court of Queen's Bench ought to be reversed.

Judgment reversed.

1813.

COURT OF EXCHEQUER.

In Michaelmas Term, 1843.

MANNING v. THE EASTERN COUNTIES RAILWAY COMPANY. Nov. 23rd.

TRESPASS for assaulting the plaintiff, seizing and laying hold of him, and causing him to be conveyed in custody along the Eastern Counties Railway for a long distance &c. Second count for forcibly conveying the plaintiff to the house of a magistrate for the county of Essex, and before him maliciously and falsely charging the plaintiff with being found illegally in and upon the said railway. Third count similar to the second, but charging also, as special damage, the expenses of procuring the plaintiff's discharge from the imprisonment.

A Railway Act (6 & 7 Will. 4, c. cvi, s. 28) empowers "the owners and occupiers of lands through or upon which the railway and other works are intended to be made to agree to accept satisfaction or recompense for the value of such lands, and also com-

penensation for any damage by them sustained by reason of the severing or dividing of such lands, and for any damage, loss, or inconvenience sustained by them by reason of the taking thereof, &c.; and in case the Company and such parties shall not agree as to the amount of compensation, &c., the same shall be ascertained by the verdict of the jury (if required) as hereinafter directed." Section 29, "for settling all differences between the Company and the owners and occupiers of any lands taken and damaged, or injuriously affected by the execution of any of the powers granted by the act," provides for the summoning of a jury by the sheriff, to inquire of, assess, and give a verdict for the money to be paid for the purchase of such lands, or by way of compensation (inter alia) for or by reason of the severing and dividing the same from other lands. Section 31 directs that such verdicts and the judgments thereon, being first signed by the person presiding, shall be deposited with, and kept by the clerk of the peace for the county, among the records of the quarter sessions, and shall be deemed records to all intents and purposes, and that such records and true copies of them shall be evidence. Section 111 enacts, that, in every case in which the owners, &c. of any lands shall, in their *arrangements* with the Company, have agreed to receive compensation for gates, &c., or passages, instead of the same being erected by the Company for the purpose of facilitating the passage to and from either side of the lands severed or divided by the said railway, it shall not be lawful for such owners, &c. to pass or cross the railway from one part to the other of the lands so severed and divided, otherwise than by a bridge, &c., to be erected at the charge of such owners. Section 216 authorizes the owners, &c. of lands, through which the railway shall be made, (except in cases where the Company shall have made proper communication), to pass and repass directly over the part of the railway made upon their lands, for the purpose of occupying them; which right, by section 217, is to cease as soon as the Company shall have constructed proper bridges, &c.

An owner of land severed by the railway claimed compensation from the Company; the question was submitted to a jury, who awarded to him compensation, on the footing that there was to be a total separation of his land without any communication being made, and he received the payment as such compensation:—*Held*, that this was an *arrangement* with the Company under Section 111; and that the owner of the land, afterwards crossing the railway for the purpose of the occupation of his land, was a trespasser within the 3 & 4 Vict. c. 97, s. 16; and that, as it was proved that the verdict of the jury had never been recorded under section 31, parol evidence of it, and of the grounds on which it proceeded, was admissible.

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Pleas—1st, Not guilty. 2ndly, As to the first count of the declaration, that before and at the said time when &c., the defendants were lawfully possessed and in the occupation of a certain close, called and known as the Eastern Counties Railway, in the parish of Romford, in the county of Essex, and being so possessed and in the occupation thereof, the plaintiff, a little before the said time when &c., with force and arms, and with a strong hand, and without the license or permission of the defendants, did break and enter the said close of the defendants, to wit, the said railway, and as much as in him lay did forcibly and wrongfully attempt to walk in, over, and along the said close and railway, and thereupon the defendants, by their servants in that behalf duly authorized, then requested the plaintiff to quit the said close or railway, which the plaintiff then wholly refused to do, and continued to walk over and upon the said close or railway; whereupon the defendants, in defence of the possession of the said close and railway, at the said time when &c., by their servants, gently laid their hands upon the plaintiff in order to remove, and did then remove the plaintiff from and out of the said close or railway, as they lawfully might for the cause aforesaid, and thereupon then conveyed him a short distance along the said railway, to wit, to the station of Romford, in the first count mentioned, that being the most convenient and proper place then and there to remove the plaintiff from the said close or railway, which are the trespasses in the first count mentioned, &c.—Verification. 3rdly, Also as to the first count, that, by an act made and passed, &c., (6 & 7 Will. 4, c. cvi), intituled “An Act for making a railway from London to Norwich and Yarmouth by Romford, Chelmsford, Colchester, and Ipswich, to be called the Eastern Counties Railway,” the defendants were united into a Company for making and maintaining the said railway and other works by the said act authorized and for the other purposes therein declared, according to

the provisions and restrictions therein mentioned, and for that purpose were incorporated by the name and style of the "Eastern Counties Railway Company;" and the defendants say, that, before the said time when &c., the said Eastern Counties Railway had been duly made and completed, according to the provisions of the said act, and carriages and trains were then running upon the line of railway so completed; and the defendants further say, that afterwards, and whilst the defendants were such railway company as aforesaid, and after the passing of a certain act made and passed, &c., (3 & 4 Vict. c. 97), intituled "An Act for regulating railways," the plaintiffs, at the said time when &c., unlawfully and illegally, at the parish of Romford aforesaid, did wilfully trespass upon the said railway of the defendants, and then and there unlawfully and wilfully did refuse to quit the same upon request then and there to him made by a certain officer of the defendants, the said Eastern Counties Railway Company, whereupon the said officer seized and detained the plaintiff in and upon the said railway of the defendants, and conveyed the plaintiff along the said railway, in the direction of the said station, called Romford Station, as he lawfully might do, in order to take the plaintiff before a justice of the peace for the said county of Essex, acting in and for the district in which the plaintiff committed the said trespass; and, because the plaintiff then and there resisted and conducted himself with violence, the said officer of the defendants necessarily a little dragged and pulled the plaintiff along the said railway, which are the said alleged trespasses in the first count mentioned, &c.—Verification. There were similar pleas justifying the trespasses complained of in the second and third counts.

On the first plea issue was joined; to the second the plaintiff replied that there was a public footway across the said close, in &c., in the use of which he passed over, &c. This was denied by the rejoinder. To the other pleas he replied *de injuriâ*.

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At the trial, before *Parke, B.*, at the summer assizes for Essex, 1843, it appeared that the plaintiff was the occupier of a farm in Romford, under the Railway Company. The farm was intersected by the railway, and no communication of any kind made by the Company between the severed portions of the land. The plaintiff contended, that he had a right under the Railway Act, 6 & 7 Will. 4, c. cvi (a), to cross

(a) Sect. 28, enacts, "That the owners and occupiers of lands through, over, or upon which the railway or other works hereby authorized are intended to be made, may agree to, and may accept and receive satisfaction or recompense for the value of such lands, and also compensation for any damage by them sustained by reason of the severing or dividing of such lands, and also for and on account of any damage, loss, or inconvenience sustained by them by reason of the taking thereof, &c.; and in case the Company and such parties respectively shall not agree as to the amount or value of such purchase-money, satisfaction, recompense, or compensation, the same shall be ascertained and settled by a verdict of a jury (if required) as hereinafter directed."

Sect. 29, "for settling all differences between the Company and the owners, lessees, and occupiers of, or persons interested in any lands taken, used, damaged, or injuriously affected by the execution of any of the powers granted by the act," provides in the usual manner for the summoning of a jury by the sheriff, "who are to inquire of and assess, and give a verdict for the sum of money to be paid for the purchase of such lands,

and also the sum of money to be paid by way of satisfaction, recompense, or compensation, either for the damages which shall before that time have been done or sustained as aforesaid, or for or by reason of the severing and dividing the same from other lands wherein any such persons shall be interested, &c., or for the future, temporary, or perpetual or recurring damages which shall be or shall have been so done or sustained as aforesaid, and the cause or occasion of which shall have been in part only obviated, removed, or repaired by the said Company, and which cannot or may not be further obviated, &c. by them; which satisfaction, recompense, or compensation for such damage or loss, shall be inquired into and assessed separately and distinctly from the value of the lands so to be taken or used as aforesaid."

Sect. 31 directs that the said verdicts and judgments, being first signed by the sheriff, &c., or other person presiding, shall be deposited with and kept by the clerk of the peace of the county, among the records of the quarter sessions, and shall be deemed records to all intents and purposes, and the same, or true copies thereof, attested under the hand of such clerk of the

the railway for this purpose, and had exercised it on the occasion in question. The defendants insisted that the

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peace, shall be allowed to be good evidence in all Courts whatsoever.

Sect. 36 enacts, "That the Company shall not be obliged, nor shall any jury to be summoned by virtue of the act be allowed (without the consent of the Company) to receive or take notice of any complaint to be made by any party for any loss or injury by him sustained, or supposed to be sustained, in consequence of the execution of any of the powers of this act, unless notice in writing, by or on behalf of the person making such complaint, stating the nature, extent, and particulars of such loss or injury, and the amount of the compensation claimed in respect thereof, shall have been given by such person to the said Company ten days before the summoning of such jury, and within the space of six calendar months after the time of such supposed loss or injury having been sustained," &c.

Sect. 111 provides, "That, in every case in which the owner of any lands, or other person by this act capacitated to convey, shall, in their *arrangements* with the said Company, have received, or agreed to receive, compensation for gates, bridges, &c., or passages, instead of the same being erected or formed by the said Company, for the purpose of facilitating the passage to and from either side of the lands severed or divided by the said railway, it shall not be lawful for such owners, or those claiming under them, to pass, and they shall for

ever be prevented from passing or crossing the said railway, from one part to the other part of their lands so severed and divided, otherwise than by a bridge, arch, or culvert, to be erected at the charge of such owners."

Sect. 216 enacts, "That it shall be lawful for the respective owners and occupiers of land through which the said railway shall be made, and their respective servants and workmen, (except in cases in which the said Company shall, at their own expense, have made proper and convenient communications from the land on one side of the said railway to the land on the other side thereof, according to any agreement with any owner or occupier thereof, or according to the provisions of this act), at all times to pass and repass, &c., directly but not otherwise, over and across such part and such part only of the said railway as shall be made in or upon their respective lands, for the purpose of occupying the same lands, without payment of any rate or toll for the same; provided that by so doing, or by consequence thereof, the passage upon or along the said railway be not in any way hindered or obstructed, or the same, or the works connected therewith, be not in any way damaged."

Sect. 217 enacts, "That, so soon as the Company shall have constructed proper bridges, &c., and passages over or under the railway, and communicating between the lands of the same owner on each

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right had been taken away either by his having received compensation from the Company for the communication, or by the provisions of the general Railway Act, 3 & 4 Vict. c. 97, s. 16 (a).

The evidence as to the compensation was, that the plaintiff had an unexpired term of eight years in the property, three acres of which were taken for the purposes of the railway; that, the Company and the plaintiff differing as to the amount of the price to be paid for the land taken, a jury was summoned for the purpose of assessing it. The verdict not having been recorded as directed by the act, no documentary proof could be given of it; but the undersheriff, who presided at the inquisition, proved that the plaintiff was present at the inquiry, and that the jury gave a verdict for the value of the land, 113*l.* 15*s.*, and for severance, £250. A receipt, signed by the plaintiff, was put in:—"Received from the Eastern Counties Railway Company, the sum of 863*l.* 15*s.*, being the amount of compensation money awarded by the jury to be paid to me," &c.

side of the railway, &c., the right of every such owner to pass over the railway, pursuant to the power contained in section 216, shall cease and determine."

(a) The 3 & 4 Vict. c. 97, s. 16, enacts, "That if any person shall wilfully obstruct or impede any officer or agent of any railway Company in the execution of his duty upon any railway, or upon or in any of the stations or other works or premises connected therewith, or if any person shall wilfully trespass upon any railway, or any of the stations or other works or premises connected therewith, and shall refuse to quit the same upon request made to him by any officer or agent of the said Com-

pany, every such person so offending, and all others aiding and assisting therein, shall and may be seized and detained by any such officer or agent, or any person whom he may call to his assistance, until such offender or offenders can be conveniently taken before some justice of the peace for the county or place wherein such offence shall be committed," and subjects the party, on conviction before such justice, to a penalty not exceeding £5, and, in default of payment thereof, to imprisonment not exceeding two calendar months, such imprisonment to be determined on payment of the amount of the penalty.

The evidence was objected to on the part of the plaintiff, but was received by the learned Judge, who left it to the jury to say whether the plaintiff preferred his claim for compensation from the Company on the footing that there was to be a total separation of his land without any communication, and whether he received the payment as such compensation. The jury found in the affirmative; and having assessed the damages at £15, in case it should turn out that the defendants were not justified in arresting the plaintiff, his Lordship directed the verdict to be entered for that sum, subject to the opinion of this Court upon the question whether the verdict of the compensation jury, and the receipt by the plaintiff of the sum awarded, was an *arrangement* between him and the Company, within the 111th section of their act; and *Shee*, Serjt., having in the following term obtained a rule nisi, to enter a verdict for the defendants or for a new trial accordingly (a)—

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Thesiger and *Ogle* now shewed cause.—The question is, whether, under the particular wording of the act 6 & 7 Will. 4, c. cvi, a party, who has received compensation assessed by a jury for the value of certain lands taken by the Company, and for the injury arising by the separation of one part of his land from the other, has entered into such an arrangement with the Company, under section 111, as to preclude himself from the right to cross the railway, in order to get to his land on the other side, if the Company will not make a good and convenient road across it. But, first, there was no legal evidence of the verdict, under sect. 31, neither the record itself, nor a copy of it, being produced at the trial. Secondly, the compensation given by the jury was only for the damage done to the property

(a) A question was also reserved as to the issue upon the right of footway, but which is not material for the purpose of these reports.

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by the severance, which is a serious inconvenience, independent of the non-communication; they had no authority to entertain the question of compensation for that, which, moreover, at that time, they had no means of ascertaining.

Section 111 does not come into operation until after the railway is made, and, therefore, after the question of compensation for severance has been decided by the sheriff's jury. [Lord *Abinger*, C. B.—The jury must of course decide according to the jurisdiction given them by the act, unless there be evidence of an arrangement between the parties, that they, as arbitrators, shall settle the rest of the compensation also: such an arrangement may be made.] It would be very difficult to presume such an arrangement in these cases, as it is only upon the parties not agreeing that the jury is called in.

Sir *W. Follett*, Solicitor-General, *Shee*, Serjt., and *James*, *contrà*. — The proceeding before the sheriff's jury is an arrangement between the parties as to their mutual rights; and the objection, that the jury had no power to entertain this question, is a strong argument in favour of a previous arrangement that they should do so. The Legislature clearly contemplated it; for sect. 28 applies to *any* damage sustained by reason of the severing or dividing of lands, and sect. 29 is recited to be for settling *all* differences between the Company and all parties interested in any lands taken and damaged, or injuriously affected by the execution of the powers of the act. Under the former, therefore, parties may agree for the compensation for damage of every kind; and, under the latter, the jury may assess it. In this case, therefore, the proceedings before the sheriff were evidence of a previous arrangement, and the jury have in effect so found.

As to the admissibility of the evidence, there having been no record of the verdict, it was clearly sufficient to prove it aliundè. [*Parke*, B.—I thought it was not essential

that the verdict should be recorded, but that, in the absence of proof to the contrary, it must be taken to have been so ; here it was proved not to have been recorded, for which reason I admitted parol evidence of it.] They were then stopped by the Court.

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LORD ABINGER, C. B.—As to the question, whether the defendants have justified themselves under their act of Parliament, one of two things appears to be made out in their behalf.—1st, Either they had a right, with the plaintiff's concurrence, to make him this compensation, and the amount of it was submitted by him to the sheriff's jury, and received by him, in pursuance of their verdict, as compensation for the severance of his land, without reference to any communication ; or, 2ndly, If the jury had no jurisdiction under the act, it came fairly within the meaning of an arrangement between the plaintiff and the Company. He claimed compensation—the jury awarded it :—the Company paid, and he received it. If they had power to differ as to the amount of it, they had power to settle it by some common tribunal. Therefore, it appears to me, that, either by a verdict which the jury had jurisdiction to give, or by an arrangement in pursuance of a previous agreement, the plaintiff had received compensation for the non-communication. He had, therefore, no right afterwards to cross the railway, and the Company were justified in preventing him. The rule, therefore, must be absolute to enter a verdict for the defendants.

PARKE, B.—I am of the same opinion. The point which I reserved for the consideration of the Court was, whether the verdict of the sheriff's jury, and the receipt by the plaintiff of the amount of compensation awarded to him by that jury for the want of any communication between his lands, was an arrangement by him with the

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Company, within the 111th section of their act. On that question I entertained, on the slight consideration which I could give to it at the trial, a different opinion from that just expressed by the Lord Chief Baron. On full consideration of the act, however, I am satisfied that the Company were right, and that the rule ought to be made absolute to enter a verdict for them.

I left it to the jury to say whether the plaintiff had preferred a claim for compensation before the sheriff's jury, not merely for the general injury sustained by the severance of his estate by the railroad, but also for the actual absence of communication, as upon the footing of no communication being to be made by the Company between the two parts of the property. I left it to the jury to say whether the plaintiff clearly meant to make, and had made that claim before the sheriff's jury; and whether he had received the amount of the compensation from the Company on that footing. The jury found that he had, and certainly I was quite satisfied with the propriety of the verdict, as it was evident, from the plaintiff's own conduct on every occasion, that he was quite aware that he had no right to the exercise of the footpath, and had no right at all to cross the railway.

Then the only question which remains is that which arose from the meaning of the 111th section of the act of Parliament.

Now, with respect to that question, the first point would be, whether or not, under the 28th and 29th sections, the jury had a right to give compensation, not merely for general injury by severance, but also for the absence of any communication to be made by the Company. I have some doubt whether the power of the jury extended to more than giving damages for the general injury sustained by severance, but that will make no difference in the result, in my opinion, as to the mode in which the verdict

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ought to be entered. Suppose the jury had no power, under the word "severance," to give compensation for a total severance; if that were so, the jury having in fact given a verdict for the amount of such compensation, the plaintiff was not entitled to receive it, unless the case did actually fall within the meaning of the term "arrangement" in the 111th section. By the 216th section, which gives the proprietors of lands the power of crossing the railway, they have a right to pass and repass across such part of it as shall be made in or upon their own lands, "except in cases in which the Company shall, at their own expense, have made proper and convenient communications from the land on one side of the railway to the land on the other side, according to any agreement with any owner or occupier thereof, or according to the provisions of this act." The section to which reference is here made in the 216th section is obviously the 111th. Therefore, the short question to which it comes is this, was there any *arrangement* with the Company by the plaintiff? The term "arrangement" is a very wide and indefinite one. If the plaintiff made a claim for the loss of communication by reason of the Company not providing a tunnel from one side of his land to the other, then it seems to me that either the sheriff's jury had power, under the 29th section, to give compensation accordingly, and that may be deemed to be an arrangement within the meaning of the act; or, if that is not so, then the case comes to this, that the plaintiff has preferred before the sheriff's jury a claim which he had no right to do, for loss by total severance, and the jury having given compensation for it, he has received it; and that falls within the meaning of the "arrangement," contemplated in the 111th section. I think that section does not, by the term "arrangement," necessarily mean a positive agreement between the Company and the party; and as it is clear that the plaintiff

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actually made that claim, and has been paid for the want of communication accordingly, it seems to me that he is now deprived of the right of going across the railway for the occupation of those lands. For these reasons, I think the verdict ought to be set aside, and the rule made absolute to enter a verdict for the defendants.

GURNEY, B., concurred.

ROLFE, B.—I am of the same opinion, although for some time I confess I entertained considerable doubt. Whether right or wrong, the plaintiff preferred his claim, and received compensation at the hands of the jury for the injury he would sustain by being precluded from going across the railway to his land, and I agree with the rest of the Court, that that amounts to an arrangement within the meaning of the 111th section.

Rule absolute to enter a verdict for
the defendants.

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COURT OF QUEEN'S BENCH.

In Michaelmas Vacation, 1843.

THE WEST LONDON RAILWAY COMPANY v. BERNARD.

Nov. 28th.

DEBT.—The declaration stated, that, before the several times of making the several calls respectively hereinafter mentioned, to wit, on the 6th of December, 1835, the defendant subscribed for a certain large sum of money, to wit, the sum of £200, towards a certain undertaking mentioned in a certain act of Parliament (6 Will. 4, c. lxxix), intituled, &c. (a), and in a certain act of Parliament (3 & 4 Vict. c. cv), intituled, &c. (b); that is to say, an undertaking for making and maintaining the said railway or tramroad and other works mentioned and referred to in the

By a Railway Act (6 Will. 4, c. lxxix) it is provided (sect. 129) that all persons who have subscribed, or who shall hereafter subscribe to the undertaking, shall pay such sums as shall from time to time be called for, and that in case of default it shall be law-

ful for the Company to sue for and to recover the same. Sect. 130 empowers the directors to make calls from the subscribers to and proprietors of the undertaking for the time being, and if any owner or proprietor shall neglect to pay his rateable proportion it shall be lawful for the Company to sue for and recover the same. Sect. 125 provides that the Company shall from time to time enter in a book the names, &c. of the several persons who shall be or become entitled to shares in the undertaking, and shall deliver a certificate thereof to every such proprietor on demand, which shall be evidence of his title to the shares.

A defendant had subscribed the parliamentary contract, but was not registered in the book as a proprietor:—*Held*, that the words “subscriber” and “proprietor” are synonymous in the act, and therefore that the defendant was liable as a *subscriber* in an action brought against him under sect. 129 for calls made on the *proprietors* of the undertaking.

Sect. 118 enacts, that the proceedings of the meetings shall be entered in a book, and shall be signed by the chairman of such respective meetings, and shall be allowed to be read in evidence in all Courts &c.:—*Held*, that the signature of the minutes of a previous meeting by the chairman at the subsequent one, in the following form:—“Confirmed, W. G.”, W. G. having been chairman of the previous meeting, was a sufficient compliance with the act.

Semble, that the signature of the parliamentary deed by each subscriber does not require a separate stamp.

(a) An act for making a railway, &c., to be called “The Birmingham, Bristol, and Thames Junction Railway.”

(b) An act to amend and enlarge the former, &c. By sect. 2, the name is changed to “The West London Railway.”

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said acts of Parliament, and for divers, to wit, ten shares of £20 each in the said undertaking. And whereas also, after the making and passing of the said first act, and whilst the defendant was such subscriber to the said undertaking and was entitled to the ten shares aforesaid, to wit, on the several days and times in that behalf respectively next mentioned, the directors for the said respective times being of the said Company, duly elected, chosen, nominated, and appointed pursuant and according to the form, effect, and provisions of the said first act, made certain calls of money as hereinafter mentioned from the several subscribers to, and proprietors of, the said undertaking for the time being upon and in respect of their respective shares therein, according to the form of the said act, the said several calls being respectively, at the respective times of making the same, found by the said directors to be, and then being, necessary for defraying the expenses of and for carrying on the said undertaking, no one of the said calls exceeding £5 upon each share, and the aggregate amount of the same, and all other calls before then made, or money before then paid for or in respect of the said shares, not exceeding the sum of £20 on each such share. And the said Company further say, that the said several calls, at the said several respective times of making the same respectively as aforesaid, were, by the directors, made payable respectively before the commencement of the suit, to wit, on the respective days and times hereinafter next mentioned, that is to say, a call of £2 on each share made on &c., and payable on &c. (stating eight calls). And the said Company further say, that there was an interval of three calendar months at least between the respective days so appointed for payment of the said calls as hereinabove mentioned, and between the day appointed for payment of the first of the said calls and the day appointed for payment of the last preceding call. And the said Company further say, that, after the making of the said calls respect-

ively as hereinbefore mentioned, and more than twenty-one days before the same became and were respectively due and payable as aforesaid, notices of the said calls respectively, and of the days and times at which the same were respectively payable as aforesaid, were respectively given, to wit, on the said several days respectively on which the said several calls were respectively made as hereinbefore mentioned, by advertisement, on and at the said respective days and times inserted in two or more London newspapers, to wit, &c., by which said notices respectively certain persons and places in the said notices mentioned were appointed and notified, to whom and at which the said several calls should and might be paid respectively at the said several times at which the same were respectively made payable as aforesaid, &c. &c., (naming certain bankers), whereby the defendant, before the commencement of this suit, became liable to pay to the said Company a certain large sum of money, to wit, £190, being the amount of the said several calls due upon and in respect of the said ten shares of and in the said undertaking to which the defendant was and is so entitled as aforesaid; yet the defendant hath not paid the said several calls so amounting together to the said sum of £190, on the said respective days, and in the manner so in that behalf appointed as aforesaid, or at any other day or time, or in any other manner whatsoever, or any, or either or any part of them, or any interest thereon, whereby and by reason of the same still remaining due and unpaid, and by virtue and according to the form and effect of the hereinbefore mentioned statutes, an action hath accrued to the Company to demand and have of and from the defendant the amount of the same respectively, together with interest thereon respectively after the rate of £5 for £100 for a year from the time the same respectively became payable as aforesaid, amounting &c. Breach.—Damages.

Pleas, 1st, Never indebted. 2nd, Defendant did not

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subscribe. 3rd, Was not, at the time of making of either of the said calls, entitled to the shares in the declaration mentioned, or either of them. 4th, Was not, at the time of making of either of the said calls, the owner or proprietor of the said shares, or either of them, concluding to the country (a). 5th, That after the defendant had so subscribed, and before any registration of proprietors, to wit, on the 1st of August, 1836, the defendant, with the knowledge of the said Company, sold and assigned all his interest in the said shares, and thereby wholly ceased to be the proprietor of either of the shares. 6th, That after the defendant had so subscribed, and after the passing of the said act of Parliament, and before the making of either of the calls in the declaration mentioned, to wit, on the 16th of August, 1836, the first general meeting of the said Company, under and by virtue and in pursuance of the said act of Parliament, was duly and according to the provisions of the said act holden, at which meeting a register of the several persons who were then entitled to shares of and in the said Company was duly and according to the provisions of the said act of Parliament made and sealed with the common seal of the said Company. And defendant further saith, that, at the time of making of such register as aforesaid, he the defendant was not a proprietor or owner of, or party entitled to any share in the said undertaking, nor was he then duly registered as such owner or proprietor or party entitled, nor hath he at any time from hence hitherto subscribed for or become entitled to, or acquired or become the owner or proprietor of any share in the undertaking in the declaration mentioned.—Verification. 7th, No such calls or call as in the declaration mentioned were or was ever made. 8th, No notice of calls

(a) To this plea there was a demurrer, on which there was judgment for the plaintiffs, on the ground that the plea did not traverse anything alleged in the declaration, and was therefore bad for concluding to the country.

was duly and according to the provisions of the said act given, modo et formâ.

Replication, joining issue on the 1st, 2nd, 3rd, 7th, and 8th pleas, and traversing the 5th. To 6th plea, the said Company say, that, after the defendant had so subscribed the said sum of £200 towards the said undertaking and for twenty-five shares therein, as in the declaration alleged, and before the making of the said calls in the declaration mentioned, and whilst he was and continued to be such subscriber as aforesaid, to wit, at the first general meeting of the said Company holden as in the said plea mentioned, and afterwards from time to time, and at all times from thence hitherto as occasion required, the said Company have always been and are now ready and willing to cause to be registered the several persons who then were, or who from time to time thereafter during the said period became entitled to shares in the said undertaking, and then, and during all the time aforesaid did cause to be registered all such persons as were ready and willing, and tendered and offered and presented themselves, and demanded and requested to be registered as the owners or proprietors of shares of and in the said Company, duly and according to the provisions of the said act of Parliament. And the said Company in fact say, that the defendant, during the whole time aforesaid, and whilst he was and continued to be such subscriber as aforesaid, did not tender, or offer, or present himself, nor did he demand or request to be registered as the owner or proprietor of the said shares, or any or either of them, but wholly neglected and refused so to do; and then, to wit, during the whole time aforesaid, prevented and hindered the said Company from so registering him the said defendant as such proprietor or owner as aforesaid as the said Company otherwise would have done; with this, that the defendant was, at the time of making and sealing of the said register in the 6th plea contained, entitled to the said shares in the said undertaking, modo et formâ.

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At the trial, before Lord *Abinger*, C. B., at the Surrey Assizes, July 28th, 1842, it appeared that the action was brought against the defendant as an original subscriber to the West London Railway for the calls upon ten shares in the undertaking, for which he subscribed prior to the passing of the act, by signing the parliamentary contracts and paying the deposit of £1 per share. His name was never registered as a proprietor of shares (under sect. 125), he never having brought in the scrip to be exchanged for shares.

In order to prove the due making of the first call, the minute book of the Company was produced with the following entry :—

“18th August, 1836.—Resolved, that a call of £2 per share be made *upon the proprietors* of this Company, to be paid to the respective bankers of this Company on or before Saturday the 15th of October next.”

At the foot of the entry of these minutes, there was this memorandum. “On the 24th of August, the minutes of the meeting of the 18th of August were read and confirmed.—W. Gunston.” He appeared to have been chairman at both meetings.

The advertisement of the call being made (required by sect. 180) was as follows :—

“Birmingham, Bristol, and Thames Junction Railway.

“Call of £2 per share.

“The directors of the Company having resolved to call, under the powers of their act of incorporation, for an instalment of £2 per share, notice is hereby given that *the holders of certificates* are required to pay on or before the 15th of October next to any of the following bankers (naming them) the sum of £2 on each of their respective shares.

“J. THOMPSON, Secretary.”

The resolution for the other calls and advertisements were nearly in the same terms as the former, and were signed by the chairman at the respective meetings.

Two objections were taken to the minute book being receivable in evidence. 1st, That the witness who produced it, who was a clerk in the office of the Company, and who stated that it came from their office and was the minute book used by the Company, was not a clerk in the office of the Company at the time the calls were made, and could not, therefore, identify it as the book kept at that time. 2. That the resolution was not signed by the chairman at the time of the meeting when it was passed, as it appeared that the minutes were not signed at all, but merely taken by the secretary, and subsequently fairly entered in the book, which was signed, upon their confirmation, at the next meeting of directors.

A verdict was found for the plaintiffs for £280, with leave to the defendant to move for a new trial, on account of the improper reception of the evidence, or to set aside the verdict and enter a nonsuit, on the ground that the defendant was only a subscriber, and not a proprietor of shares; and *Charnell*, Serjt., in Michaelmas Term following, obtained a rule nisi accordingly on the following grounds:—

1. That the evidence adduced of calls being made only applies to proprietors of shares, between whom and subscribers a difference is made by the act.

2. That, even if they are to be treated as the same, the book tendered and received in evidence was not properly receivable for two reasons: 1st, that the clerk who produced it could not identify it as the book in existence when the calls in question were made; 2ndly, that the minute of the directors making the calls was not signed by the chairman at the meeting when made; but at the meeting of the following week.

He also objected, that the deed produced and signed

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by the defendant was not receivable in evidence, having only one stamp; that the signature of each formed a separate contract and required a separate stamp; but abandoned that point on the authority of *Davis v. Williams* (a) and *Ramsbottom v. Davis* (b).

Thesiger and *James* (c) shewed cause.—1. Assuming that

(a) 13 East, 232.

(b) 4 M. & W. 584.

(c) The material sections of the act 6 Will. 4, c. lxxix, are as follows:—

Sect. 1 enacts, "That the several persons therein named, and all other persons and corporations who have *subscribed* or *shall hereafter subscribe* towards the said undertaking, and their several and respective successors, executors, administrators, and assigns, shall be, and they are hereby united into a Company for making and maintaining the said railway and other works by this act authorised," &c.

Sect. 3 enacts, "That it shall be lawful for the said Company to raise amongst themselves any sum of money for making and maintaining the said railway and other works by this act authorised, not exceeding in the whole the sum of 150,000*l.*, the whole to be divided into shares of 20*l.* each; and such shares shall be numbered, &c., and the said shares shall be and they are hereby vested in the several parties taking the same, and their several and respective successors, executors, administrators, and assigns, to their proper use and benefit, proportionably to the sum which they shall severally contribute; and all persons and corporations, and

their several and respective successors, &c., who have *subscribed* or *shall severally subscribe* for one or more share or shares, or such sum or sums as shall be demanded in lieu thereof, towards the said undertaking, and other the purposes of the said subscription, shall be entitled to and receive, in proportionable parts according to the respective sums so by them respectively paid, the net profits and advantages which shall arise or accrue from or by the rates, tolls, and other sums of money to be received by the said Company, as and when the same shall be divided by the authority of this act."

Sect. 104 enacts, "That at all general and special general meetings held by virtue of this act, all persons and corporations who shall have duly subscribed for, or become entitled to five shares in the said undertaking, and their respective successors, &c., shall have a vote for such shares, and shall have an additional vote for every five shares which they shall have subscribed for or become entitled to in the said undertaking, but no person shall have more than twenty votes although possessed of more than one hundred shares in the said undertaking, and such vote or votes may be given by such respective

there is really a difference between proprietors and subscribers, there is nothing in the language of the calls in

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parties, or in their absence by their respective proxies constituted under the seals of such bodies, or under the hands of the other proprietors appointing such proxies; all such proxies being proprietors of shares in the said undertaking," &c.

[The section gives the form of proxy, commencing thus:—"A. B., of _____, one of the proprietors of the Birmingham, Bristol, and Thames Junction Railway Company, doth hereby appoint C. D., of _____, to be the proxy of the said A. B.," &c.]

Section 118 enacts, "That the orders and proceedings of all meetings, as well general as special, of the said Company, and of the said directors and committees respectively, shall be entered in some book or books to be provided and kept for that purpose, *and shall be signed by the chairman of such respective meetings*; and such orders and proceedings, when so entered and signed, shall be deemed original orders and proceedings, and shall be allowed to be read in evidence in all Courts, and before all Judges, justices, and others, and that without due proof of such respective meetings having been duly convened, or of the persons making or entering such orders or proceedings being proprietors, or being directors, or members of the committee, or of the signature of such chairman, as the case may be, all of which last mentioned acts shall be presumed."

Sect. 125 enacts, "That the said Company shall, at their first or

some subsequent general meeting, and afterwards from time to time as occasion may require, cause the names of the several corporations, and the names and additions of the several persons *who shall then be or who shall from time to time thereafter become entitled to shares in the said undertaking*, with the number of shares which they are respectively entitled to, and the amount of the subscriptions paid thereon, and also the proper number by which every share shall be distinguished, to be fairly and distinctly entered in a book to be kept by the said Company, and, after such entry made, to cause their common seal to be affixed thereto; and the said Company shall from time to time cause a certificate or ticket with the common seal of the said Company affixed thereto to be delivered to every such proprietor on demand, specifying the share or shares to which he is entitled in the said undertaking, such proprietor paying to the said Company the sum of 2s. 6d., and no more, for every such certificate or ticket; and such certificate or ticket shall be admitted in all Courts whatever as *prima facie* evidence of the title of such respective proprietors, their successors, executors, administrators, or assigns, to the share or shares therein specified; but the want of such certificate or ticket shall not hinder or prevent the proprietor of any of the said shares from selling or disposing thereof" (and the section gives the form of certificate).

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question making them applicable to one description of persons more than another; it as much calls on subscribers as on shareholders.

Sect. 129. "That the several parties who have subscribed, or who shall hereafter subscribe for or towards the said undertaking, shall, and they are hereby required to pay the sums of money subscribed for, or such parts or proportions thereof as shall from time to time be called for by the directors of the said Company, under and by virtue of the powers of this act, at such times, and at such places, and to such persons as shall be directed by the said directors; and in case any party shall refuse or neglect to pay as aforesaid the money by him so subscribed for, or the part thereof so called for, it shall be lawful for the said Company to sue for and recover the same, with full costs of suit in any Courts of law or equity, together with interest on such unpaid sum of money, at the rate of £5 per centum per annum, from the time when the same was directed to be paid as aforesaid up to the day of actual payment thereof."

Sect. 130 enacts, "That the said directors shall have power from time to time to make such calls of money from the subscribers to and proprietors of the said undertaking for the time being, to defray the expenses of, and to carry on the same, as they from time to time shall find necessary; so that the aggregate amount of calls made, or money paid for or in respect of any such shares, shall not amount to more than the sum of £20 on any such share, and so that no such

call shall exceed the sum of £5 upon each share which any person or corporation shall be possessed of or entitled unto in the said undertaking; and an interval of three calendar months, at the least, shall elapse between the day appointed for payment of one call, and the day appointed for payment of another call; and twenty-one days' notice, at the least, shall be given of every such call by advertisement inserted in two or more London newspapers; and all monies so called for shall be paid to such persons, at such times and places, and in such manner, as in the said notice shall be appointed, and the respective owners of shares in the said undertaking shall pay their rateable proportion of the monies to be called for as aforesaid, to such persons, and at such times and places, and in such manner as shall be appointed as aforesaid; and if any owner or proprietor for the time being of any such share shall not so pay such his rateable proportion, then and in such case, and as often as the same shall happen, he shall pay interest for the same after the rate of £5 per centum per annum, from the day appointed for the payment thereof, up to the time when the same shall be actually paid; and if any owner or proprietor for the time being of any such share shall neglect or refuse to pay such his rateable proportion, together with interest, if any, then, or at any time thereafter, it

But the words are used in the act as synonymous, and, as is said in the case of *The London Grand Junction Railway v. Freeman* (a), "We cannot suppose Parliament to have been ignorant of the manner in which subscriptions had been made and the transfer of shares negotiated, and if the intention was to allow none to be proprietors but such

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shall be lawful for the said Company to sue for and recover the same in any of his Majesty's Courts of record, by action of debt, or on the case, or by bill, suit, or information; or the said directors may, and they are hereby authorised to declare the shares belonging to such owner to be forfeited, and to order such shares to be sold," &c.

Sect. 132. "That, in any action to be brought by the Company against any proprietor for the time being of any share in the said undertaking, to recover any money due and payable for or in respect of any call, it shall be sufficient for the said Company to declare and allege that the defendant, being the proprietor of a share in the said undertaking, is indebted to the said Company in such sum of money as the calls in arrear shall amount to, for a call, or so many calls, of such sums of money, upon a share belonging to the said defendant, whereby an action hath accrued to the said Company by virtue of this act, without setting forth the special matter; and on the trial of such action it shall only be necessary to prove that the defendant, at the time of making such respective calls, was a proprietor of a share in the said undertaking, and that such call was in fact made, and that such notice was given as is directed by this act,

without proving the appointment of the directors who made such calls, or any other matter whatsoever; and the said Company shall thereupon be entitled to recover what shall appear due, including interest, computed as aforesaid, on such calls, unless it shall appear that any such call exceeded £5 per share, or was made payable before the expiration of three calendar months from the day appointed for payment of the last preceding call, or that notice was not given as hereinbefore required; and in order to prove that the defendant was a proprietor of such share in the said undertaking as alleged, the production of the book in which the said Company is by this act directed to enter and keep the names and additions of the several proprietors from time to time of shares in the said undertaking, with the number of shares they are respectively entitled to, and of the places of abode of the several proprietors of the said undertaking, and of the several persons &c. who shall from time to time become proprietors thereof, or be entitled to shares therein, shall be *prima facie* evidence that such defendant is a proprietor, and of the number and amount of his share therein."

(a) *Antè*, Vol. 2, p. 503; 2 M. & G. 606.

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as had been originally subscribers, it could not have failed to appear distinctly. Instead of this, the various clauses shew the most lax employment of all the phrases by which property in the undertaking could be described out of the most popular vocabulary. These expressions are not designedly varied according to the subject-matter of the respective clauses, but arbitrarily and indiscriminately used as all bearing the same import." And in *The Great North of England Railway v. Biddulph* (a), Parke, B., says, "a subscriber seems to me to be a proprietor within the meaning of the act;" and Alderson, B., treats the terms as used synonymously. So here, in section 1, the Company is declared to consist of certain individuals, and all others who shall have subscribed, or shall thereafter subscribe towards the said undertaking. Sect. 3 directs that the several persons who have subscribed or shall thereafter subscribe shall participate rateably in the profit; and sect. 104 prescribes how proprietors are to vote, and the number of votes they are to have, and those proprietors are said to be "all persons and corporations in the said undertaking who shall have duly subscribed for, or become entitled to five shares in the said undertaking;" and such parties may give proxies to "the other proprietors;" and the form is, "A. B., one of the proprietors," &c. The only argument to be raised for the defendant is, that sect. 130, authorising calls to be made, gives a remedy only against owners and proprietors; and sect. 129, directing subscribers to pay their subscriptions, gives a different right of action in the event of their not being paid. But that same section (130) gives power to make calls on the subscribers to *and* proprietors of the undertaking; so that, if the former were not included in that part of the section giving remedy, there is either no power to make calls on subscribers at all, or the Company are empowered to insist on their paying the

(a) *Ante*, Vol. 2, p. 416; 7 M. & W. 243.

whole amount of their subscriptions at once, which, it is presumed, could never have been the intention of the Legislature.

2. As to the witness, who produced the book, not speaking to its identity, it would seem from sect. 133 that it is only necessary to produce the book without calling any witness for that purpose. The other point has been expressly decided in *The Southampton Dock Company v. Richards* (a), where the Court of Common Pleas held upon more stringent language in a statute ("shall be signed by the chairman at each respective meeting") that it was not necessary that the minutes should be signed on the same day that they were entered, but only that they should be signed by the chairman who presided at the meeting. That decision was acted upon in *The London and Brighton Railway Company v. Fairclough* (b). In *Regina v. The Mayor of Evesham* (c), all the Court decided was, that, the minute having been taken away from the custody of the town clerk after the meeting, they would not issue a mandamus to compel him to enter the minute, as there was no evidence that it was a correct account of what passed at the meeting. In *Miles v. Bough* (d), that case was distinguished on that express ground by Lord Denman, C. J., and the ruling of the two former cases supported.

Bompas, Serjt., and *Channell*, Serjt., contra.—This is not an action for calls against the defendant as proprietor of shares in the Company, nor does it charge him in the form given by the act. The 125th section requires the names of subscribers to be entered, and certificates of their shares given to them sealed with the seal of the Company. Then sect. 130 gives the right to make calls; and sect. 132 prescribes the form of proceeding, and of the de-

(a) *Antè*, Vol. 2, p. 215; 1 G. 674.
M. & G. 448.

(b) *Antè*, Vol. 2, p. 544; 2 M. &

(c) 8 A. & E. 266.

(d) *Post*, p. 668; 3 Q. B. R. 845.

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claration, and the proof required; but it is contended that the defendant, being only a subscriber to the original undertaking, is as much liable to pay the amount of the calls, and by the same process, as a proprietor who has been registered. The act, however, in sect. 129, gives power to the Company to make calls on the subscribers, and thereby evidently makes a distinction between a subscriber to the original contract, who is liable to an action of debt under that section, and the registered proprietors who are provided for by sect. 130. The declaration in this case was framed to meet the former class. It states that the defendant subscribed for shares in the undertaking, and that calls were made upon him as such subscriber or proprietor, (following the words of sect. 130). The meaning is, that in the intention of the act subscribers are persons who have subscribed the parliamentary contract, who, also being subscribers and proprietors within the meaning of sect. 130, (that is, by being registered), are rendered liable to proceedings under that section for calls, as is said in *The London Grand Junction Railway Company v. Freeman (a)*, "Taking all these things into consideration, the Court cannot doubt that all are made liable to pay calls, who, having before the passing of the act become entitled by the then well understood mode of transfer, were afterwards *registered* as shareholders."

It is admitted, that the defendant in this case did subscribe the parliamentary contract, and that, therefore, by sect. 129, he would have been responsible, provided a call had been made on the subscribers under that section. But the register not being produced, there was no proof that he was a proprietor in the sense to make him liable to the process of the 130th section; and the declaration having charged him in the way prescribed by a section applicable only to original subscribers, to make it good the plaintiffs

(a) *Antè*, Vol. 2, p. 468; 2 M. & G. 606.

were bound to shew that the calls had been made on the subscribers. The calls given in evidence were calls on the *proprietors*, and the advertisements of the calls stated that, in one case, *the holders of certificates*, and, in another, *the proprietors*, were required to pay the amounts called for on their respective shares. That shews that the calls were made, not on the subscribers, but only on the registered proprietors; and that the defendant was not liable in this action.

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With respect to the book, it is clearly necessary that it should be certified, which could not be done by the witness who produced it, as he was not in the employ of the Company at the date of the making the calls: it is, therefore, possible that the book might have been made up, and the entries in it written long after the time in question. The same objection applies to the signature of the minutes, for there is nothing to shew that the same irregularities which appeared in *Regina v. Mayor of Evesham* (a) have not occurred in this case. [Lord Denman, C. J.—We must abide by the decision which we have recognised in *Miles v. Bough* (b). It may be better that the chairman should sign at the meeting where the proceedings take place; but he is not the less the chairman of that meeting because he presides at the next.] At all events, his signature to the entry in this book applies only to the confirmation, and not to the entry of the minutes; so that there is in fact no signature to the entry.

LORD DENMAN, C. J.—The first point was decided in the case of *The London Grand Junction Railway Company v. Freeman* (c). We then looked at all the sections of a similar act of Parliament, and for the same purpose of making parties liable to calls; and we were of opinion that “subscribers,” “proprietors,” and “owners of shares” were

(a) 8 A. & E. 266.

(b) Post, p. 668; 3 Q.B.R. 845.

(c) Antè, Vol. 2, p. 468; 2 M.

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words indiscriminately used, but all pointing to the same set of persons; and, I think, here the argument is stronger within sect. 130, following the 129th; the 129th mentioning only subscribers, and the 130th speaking of *subscribers and proprietors* as subject to calls. All the parties here being members of the same Company, and parties in a certain degree to the same act of Parliament, ought all to contribute where they are described by that act as liable so to do. With regard to the only remaining point, namely, whether the signature by the chairman, subsequently, at a different meeting, is the signature of the first minutes, inasmuch as the signature is to a confirmation of those minutes brought forward at the second meeting, it seems to me to come within the case which is admitted to be the ruling law on the subject, *The Southampton Dock Company v. Richards (a)*: and it is not by entering the word "confirmed" that the signature of the chairman is done away with; it is still the signature of the individual who was the chairman; and we may take it, therefore, that all that was required under the act of Parliament has been done.

PATTESON, J.—This declaration is not in the form given by the act of Parliament. There is no advantage taken of that clause which says how the declaration may be framed; but it is a declaration framed at common law, and the averment in it is, that the defendant was a subscriber and liable to calls. It seems that all the pleas traversing this are found by the jury against the defendant, they considering that the defendant, as such subscriber, was entitled to the shares at the time the calls were made. The only question then is, whether the calls were made in a proper form, so as to entitle the Company to maintain this action? The resolution is, that there shall be a call of £2 per share, where the word "proprietor" only is used, and no other

(a) Antè, Vol. 2, p. 215; 1 M. & G. 448.

word. It comes then to the question, whether the resolution is, in point of fact, a call on those persons who are said to be, in some sense, not proprietors, but subscribers only? I think that point has been really determined already in the case alluded to, of *The London Grand Junction Railway Company v. Freeman (a)*, and for this purpose proprietors and subscribers mean the same, though not for all purposes under the act. I cannot attempt to explain all the words of the particular clauses of this act of Parliament; but the way I read the 130th section, on which observation has been made, and which is the only section on which the plaintiffs proceed, is this, that the directors shall make calls on the subscribers to and proprietors of the shares in the railway; and then it says, that the owners of the shares (not the proprietors and subscribers, but the owners only) shall pay; and it says, if the owners and proprietors do not pay, an action may be brought against the owners and proprietors; and further on, if such owner or proprietor do not pay, the share or shares of such owner may be declared to be forfeited. It is suggested, that it is quite ridiculous; and no doubt that particular clause is so. Still I think, for this purpose, it is clear that, if they shew the Court a resolution calling on the proprietors of shares and subscribers, the call is sufficient.

The only point then is as to the book, and the signature of the resolution. It is contended, as I understand, because the word "confirmed" is put in, that therefore the signature of the chairman is his signature of confirmation only, and not of the original matter; if so, that unfortunate book has no signature from the beginning to the end, as they are all in the same form. But it seems, upon consideration, there is nothing in that; it is the signature of a minute that is entered in form in the book afterwards, the same person having signed it as chairman.

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(a) *Antè*, Vol. 2, p. 468; 2 M. & G. 606.

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WILLIAMS, J.—It seems to me that it is impossible to distinguish this case from *Miles v. Bough* (a) and *The Southampton Dock Company v. Richards* (b). This is a signature at a subsequent meeting, at which the minutes of a former meeting are read over and confirmed by a person who was the chairman at both meetings; that is distinctly admitted, but is denied to be sufficient. It is impossible to contend, as it seems to me, that it is not. With regard to the argument upon the 128th and 129th sections—letting it possess all the weight that can be attributed to it, what is it? when in the very next section the words are scattered about as if from an urn, without selection, “owner,” “proprietor,” “subscriber,” all apparently meaning the same thing. Immediately upon the pressing part of the case, namely, the making calls, “subscribers to” and “proprietors of the said undertaking” seem to be used as directly synonymous.

COLERIDGE, J.—I think the act of Parliament is so framed, that, whichever way we put an interpretation on these words, it would be open to some ingenious objection, so that it is not possible for the Court to decide in any way but that there may be some argument raised against the decision. It seems that there is a case in which it has been determined that these words are synonymous; and that being so, it is decided rather by authority than anything else. With respect to the second point, as to the book, no doubt there is a distinction in point of fact between this and the cases cited, but the question is, whether there is any in point of principle. We find appended to the end of the resolution of the particular meeting the signature of the person who was chairman. We have determined, that, though a thing appear not to be done

(a) Post, p. 668; 3 Q. B. R. 845.

(b) Antè, Vol. 2, p. 215; 1 M. & G. 448.

at a particular meeting, but at a subsequent one, that is sufficient; but, in addition to that, it appears that the same person was acting as chairman at the subsequent meeting confirming the former resolutions. In accordance with the authority of *Miles v. Bough* (a) and *The Southampton Dock Company v. Richards* (b), the act of Parliament is satisfied by the signature of the chairman at a subsequent meeting. He does not sign then as retaining his office of chairman of a former meeting, but as having been chairman of that meeting. Is it worse, because, in addition, there is the confirmation of those proceedings, and he signs with the words "confirmed at" &c. above his name? It is still the signature by him, having been chairman of the former meeting.

Rule discharged (c).

- (a) Post, p. 668; 3 Q.B.R. 845. & G. 448.
 (b) Antè, Vol. 2, p. 215; 1 M. (c) See the next case.

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In Trinity Term, 1844.

1842.

Nov. 21st.

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May 22nd.

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By an act,
(11 Geo. 4 & 1
Will. 4, c. lxiix,
ss. 1, 2, 3), cer-

tain trustees were created for the purpose of building a bridge.

Sect. 5 qualified and disqualified certain persons for trustees, and imposed a penalty on persons elected or appointed trustees acting as such without being qualified or without taking the oath prescribed by sect. 6, but provided that all acts of persons acting as trustees, though not duly qualified or disqualified, previous to their being convicted of the offence, should be valid.

Sect. 6 gave the form of the oath, and enacted that no person should be capable of acting as a trustee (except in administering the oath) until he should have taken and subscribed it, which oath it should be lawful for any one of the said trustees to administer, and which, so taken and subscribed by each trustee, was to be entered in the book of their proceedings.

Sect. 11 directed the trustees to keep a book, and to make proper entries therein of the names of the trustees who should attend the meetings, and of all orders and proceedings relative to the execution of the act; and that the chairman of every meeting should subscribe his name at the end of the proceedings of the said trustees at such meeting, and that such book should be admitted in evidence.

Sect. 85 provided, that persons who should agree to give or lend any money towards carrying the act into execution should pay the same to the treasurer of the said trustees, as the trustees should order and direct; and, if any person should neglect or refuse to pay, the trustees might sue for and recover the same in the name of their treasurer by action of debt or on the case.

Sect. 109 enacted, that, in all cases where it might be necessary for the trustees to give any notice under the act, such notice should be in writing or print, and be signed by them or some of the trustees, or by the clerk or clerks for the time being to the said trustees by their order.

In an action against a defendant, who had agreed to lend the trustees £25, for non-payment of calls—*Held*, 1. That an agreement to lend the £25 might be inferred from a paper signed by the defendant, which referred to an engagement to subscribe a certain sum therein set against his name, coupled with proof of payment by him of an earlier call corresponding to that on £25, and of his taking a receipt for a call on a loan of that sum; and that such agreement was not within sect. 4 of the Statute of Frauds, (29 Car. 2, c. 4), though a prospectus had previously issued stating that the whole sum would not be (nor was it) called for within a year.

2. That the action on an agreement to give or lend might be brought either in debt or case.

3. That notice of a call, though not expressly required by the statute, was necessary.

4. That it was sufficient to allege in the declaration that the calls were made by order of the trustees, and that defendant had due notice of the calls, to wit, by notice in writing signed by the clerks to the trustees, and (at all events after verdict) without stating that the notice was given by order of the trustees.

5. That an order by the trustees to pay the call into a certain bank to the account of the treasurer to the trustees was sufficient.

6. That a notice in the names of the clerks, but signed only by a clerk in their employment, was insufficient, and, where proved to have been the only one given to the defendant, was not

Parliament, (11 Geo. 4 & 1 Will. 4, c. lxix), intituled "An Act for building a bridge over the river Avon, from Clifton, in the county of Gloucester, to the opposite side of the river in the county of Somerset, and for making convenient roads and approaches to communicate therewith (a),"

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cured by his subsequent promise to pay; but, where not proved to have been the only one given, a good notice might be inferred from the fact of such promise to pay.

7. *Semble*, that signature by one of two joint clerks in the name of both would be sufficient.

8. That the acts of trustees who had not duly taken the oath were invalid.

9. But that it was sufficient evidence of their having been sworn, that, in the first page of the book of proceedings, the signatures of the trustees were subscribed to the form of the oath (which had been copied there with blanks for the names), and that in the proceedings of the meetings entries were made that the trustees whose names were subscribed to the oath were sworn at such meetings.

10. That the entries in the book, which were made up by the clerks after the meeting, and signed by the chairman of the meeting subsequently, were good evidence; but that, as the statute did not make the book the only evidence, the absence of an entry might be cured by evidence of the express promise to pay.

(a) The material sections of the act are as follows:—

Sect. 1 recites a bequest, made by William Vick, of monies in trust to be laid out in building a bridge over the Avon from Clifton Down to Leigh Down, procuring the act of Parliament, making compensation, &c.; that an alteration of the plan was desirable; that divers persons had subscribed, and others were willing to subscribe money in aid of the trust if such alterations were made; and that several persons had agreed to lend and advance certain sums on condition of a toll being imposed till principal and interest should be repaid: it is then enacted, that the fund, and all sums subscribed or to be subscribed, be vested in the master of the Society for the time being of Merchant Adventurers in Bristol, the senior sheriff of Bristol for the time being, and Thomas Daniel, and their successors, to be elected as after mentioned, discharged of the

trusts of the will, and upon the trusts thereafter declared.

Sects. 2 and 3 give power to the existing trustees to elect thirty-five new trustees.

Sect. 4 directs the supplying of vacancies in the number of trustees by election, to be made by the surviving and remaining trustees. "And every trustee so elected and appointed as aforesaid, having taken and subscribed the oath or affirmation hereinafter directed, and being qualified in manner hereinafter mentioned, shall have the same power and authority to act in the execution of this act as was vested in the trustee in whose place or stead he shall have been elected and appointed as aforesaid."

Sect. 5 enacts, "That no person, except he shall be or become a trustee by virtue of his situation or office, shall be capable of being elected or appointed a trustee, or of acting as a trustee under this act, unless, at the time of his

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and being the nominal plaintiff in this action for and on behalf of the said trustees, demands 17*l.* 10*s.*, for that whereas

election or appointment and acting, he shall be seized or possessed &c. [setting forth a pecuniary qualification]; and if any such person hereby appointed, or who shall be elected or appointed a trustee under this act, (except as aforesaid), shall act as such without being qualified as aforesaid, or without taking the oath or affirmation hereinafter mentioned, or shall act as a trustee relating to any matter or thing in which he shall be personally concerned or interested, or being a licensed victualler, or being concerned or interested in any contract relating to this act, every such person shall, for every such offence, forfeit and pay the sum of £100 to any person or persons who shall sue for the same, to be recovered, together with full costs of suit, in any of his Majesty's courts, &c.: Provided always, that all acts and proceedings of any person or persons acting as a trustee or trustees in the execution of this act, though not duly qualified or being disqualified as aforesaid, previous to his or their being convicted of the said offence, shall, notwithstanding such conviction, be as good, valid, and effectual as if such person or persons had been duly qualified and not disqualified to act as a trustee or trustees according to the directions of this act."

Sect. 6 provides, "That no person shall be capable of acting as a trustee in the execution of this

act, except in administering the following oath or affirmation, until he shall have taken and subscribed an oath or affirmation in the form or to the effect following: [the words of the oath are then set out]; "which oath or affirmation it shall be lawful for any one of the said trustees to administer, and he is hereby required to administer the same to any other of the said trustees; and the said oath or affirmation, so taken and subscribed by each such trustee, shall be entered in the book of proceedings of the said trustees, to be kept by their clerk for the time being."

Sect. 11 enacts, "That the said trustees shall cause to be provided and kept a proper book, and proper entries to be made therein of the names of the several trustees who shall attend the respective meetings, and of all orders and proceedings made or taken relative to the execution of this act; and the chairman of every meeting of the said trustees shall subscribe his name at the end of the proceedings of the said trustees at such meeting; and all such books, and also all books kept for registering mortgages, &c., shall be admitted as evidence in all courts, and upon all occasions whatsoever; and all such books shall at all reasonable times be open to the inspection of the said trustees and of any creditor," &c.

Sect. 13 enacts, "That the said

theretofore, to wit, on the 1st of January, 1835, the defendant agreed with the trustees to lend the sum of £25 to

trustees shall and may, whenever they shall think proper, appoint and employ a treasurer or treasurers, clerk or clerks, surveyor or surveyors, and such other officer or officers, person or persons, for the execution of this act, or for any other matter or thing relating to the powers hereby vested in the said trustees, as they the said trustees shall think proper; and the said trustees shall and may from time to time remove them or any of them, and in like manner appoint others in the room of those removed."

Sect. 85 enacts, "That the several persons who have agreed to give or lend, or who shall hereafter agree to give or lend any money towards carrying this act into execution, and their several and respective heirs, executors, and administrators, shall, and they are hereby required to pay the respective sums so agreed to be given or lent, or which shall hereafter be agreed to be given or lent, to the treasurer of the said trustees, at such times and in such parts and proportions as the said trustees shall order and direct; and if any person shall neglect or refuse to pay the same as aforesaid, it shall be lawful for the said trustees to sue for and recover the same in the name of their treasurer, in any of his Majesty's courts of record, by action of debt or on the case, or by bill, suit, or information, wherein no essoin, protection, wager of law, or more than one

imparlance, shall be allowed."

Sect. 109 enacts, "That in all cases where it may be necessary for any person to serve any notice or other proceeding upon the said trustees, service thereof respectively upon any one of the said trustees who may be a member of a committee for managing the affairs of the said trustees, or left at his last or usual place of abode, or upon the clerk or clerks of the said trustees, or left at the office of such clerk or clerks, or at his or their last or usual place of abode, shall be deemed sufficient service of the same upon the said trustees; and in all cases where it may be necessary for the said trustees to give any notice to any person or body whomsoever, under the provisions of this act, such notice shall be in writing or in print, and be signed by any three or more of the said trustees, or by the clerk or clerks for the time being to the said trustees by their order, and shall be delivered to such person or left at his last or usual place of abode, or be delivered to some member of such body, or left at his last or usual place of abode, or to some clerk or other officer of such body, or left at the office of such clerk or other officer, or at his last or usual place of abode, except in cases in which any other mode of giving such respective notices is by this act particularly directed; and in all cases where any public notice is by this act directed to be given by the said

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the said trustees, towards carrying the said act into execution, the said sum with interest thereon to be secured and repaid to the defendant in manner in and by the said act mentioned and directed in that behalf; and thereupon, according to the said act of Parliament, the defendant then became and was liable to pay the said sum so agreed to be lent as aforesaid to the treasurer of the said trustees, at such times and in such parts and proportions as the said trustees should order and direct. And the plaintiff in fact says, that afterwards, to wit, on the 20th of November, 1837, a part, to wit, 15 per cent., only of the monies given and lent towards carrying the said act into execution having been called for by the trustees or paid by the persons who had respectively agreed to give or lend the said monies, the trustees, by their order then made, ordered and directed that 10 per cent. should be paid by the persons who had agreed to give or lend money towards carrying the said act into execution, the same to be paid to the plaintiff, then being the treasurer of the trustees, on or before the 20th of January, 1838, and which day at the commencement of this suit had long elapsed; of which said order of the said trustees, the defendant, before the last-mentioned day, to wit, on the 22nd of November, 1837, and on divers &c., had due notice, to wit, by notice in writing, signed by the then clerk of the said trustees, and then left at the then usual place of abode of the defendant; and the defendant was then requested by the said trustees to pay the amount by the said order directed to be paid at the time and in manner in the said order in that behalf mentioned as aforesaid. Yet the defendant has not paid the said amount, or any part thereof; whereby, and by reason

trustees, (except where otherwise by this act directed), such notice shall be in writing or in print, and be signed by any three or more of the said trustees, or by the clerk or clerks to the said

trustees for the time being, and be affixed &c.; and all such notices, so published and given, shall be good and available in law for all the purposes of this act."

of the non-payment thereof, an action hath accrued to the plaintiff to demand and have from the defendant the sum of 2*l.* 10*s.*, being 10 per cent. upon the said sum so agreed to be lent by the defendant as aforesaid, and being parcel of the sum above demanded.

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2nd count, for a call of £2 10*s.*, made 15th Oct. 1838, payable 19th Jan. 1839.

3rd " " £2 10*s.* " 17th Aug. 1839 " 19th Sept. 1839.

4th " " £5 (20 pr. ct.) 16th Nov. 1839 " 20th Jan. 1840.

5th " " £5 " 6th Aug. 1840 " 14th Sept. 1840.

Pleas.—1. That defendant did not agree in manner and form as in the declaration is mentioned.

2. That plaintiff was not, at the time of the commencement of this suit, the treasurer of the trustees for the purposes of the act, modo et formâ &c.

3. That defendant had no notice of the respective orders of the trustees in the declaration mentioned, or any or either of them, modo et formâ &c.

4. Fraud and covin.

5. That the consideration for lending the money was that the trustees should duly execute the powers of the act, which they did not do.

6. That no such orders as in the declaration mentioned were, nor was any or either of them, made at a meeting of the trustees duly held in accordance with the directions of the act, as in and by the declaration appeared in that behalf.

7. That the trustees in the declaration mentioned were not, nor was any or either of them, at the several and respective times of making the said orders, respectively trustees or trustee duly appointed and qualified, according to the directions and within the true intent and meaning of the act.

8. That, before the making of the orders, more than seven years from the time of the passing of the act had elapsed; and that the bridge, &c. were not completed so as to be

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passable, nor so certified by the justices, according to the provisions of the act.

Special demurrer to the 5th plea, and general demurrer to the 8th. The other pleas concluded to the country, and on them issue was joined.

The cause was tried before *Maule*, J., at the Bristol Assizes, August 20th, 1841.

On the part of the plaintiff, the following agreement to lend the £25, signed by the defendant and others, was put in :—

“Clifton Suspension Bridge.

“The undersigned having engaged to subscribe the several sums set against our names towards the erection of this bridge, upon the terms &c. [stating a condition], we hereby agree to dispense with the condition above stated, and that the subscription we have made shall be, and be deemed to be so made, subject only to and upon the terms of the act of Parliament passed for carrying the undertaking into effect.”

The previous engagement referred to was not produced; but defendant was proved to have paid a call prior to those in question, corresponding to a loan of £25, and to have received a receipt purporting to be on a call of £25. It appeared, that, before the signing of the above agreement, a prospectus had been issued by the Company.

1. It was objected, on the part of the defendant, that, as the prospectus shewed the sums were not to be called for till after more than a year had expired, the agreement must be in writing, under the Statute of Frauds, 29 Car. 2, c. 3, s. 4; and that the above document was insufficient, as not naming the sum subscribed for, which could not be supplied otherwise.—Overruled.

The book in which the proceedings of the trustees were

entered was then tendered. It appeared in evidence that the proceedings which took place at the meetings of the trustees were taken down at the time on separate papers, and after the meeting transcribed into the book, and signed some time afterwards by the chairman who had presided at the meeting.

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2. It was objected by the defendant, that the book was not admissible in evidence, as not being kept according to the provision of sect. 11.—Overruled.

The book of the proceedings was then put in. It contained in the beginning an entry of the form of the oath prescribed by sect. 6, under which the trustees had signed their names; opposite to some of the names only was a date, which was explained to denote the time of their taking and subscribing to the oath. The book also contained entries, in the minutes of meetings, that the said trustees had respectively, some at one time and some at another, "qualified by taking and subscribing to the oath prescribed by the act." It did not appear from the book who had administered the oath.

3. It was objected that the book did not shew that the trustees were duly sworn, so as to be qualified to act.—Overruled.

It was then proved that the plaintiff had been appointed treasurer to the trustees, and that he was a partner in the bank of Messrs. Miles, Harford, & Co., Bristol, and, to shew the order for the making of the calls by the trustees, entries in the minute-book were read, one of which was as follows:—"Ordered and directed, that the sum of £10 per cent. be paid by the several subscribers, or persons who have agreed to give or lend money towards carrying the act into execution, the same to be paid into the bank of Messrs. Miles, Harford, & Co., on or before the 20th of January next, to be placed to the account of Philip John Miles, Esq., treasurer to the trustees."

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4. It was objected, that these orders were not according to sect. 85, which requires the sum subscribed to be paid to the treasurer as such.—Overruled.

Evidence was then given that a letter had been sent to the defendant, 30th of November, 1840, signed "Osborne, Ward, & Co.," giving him notice that an action would be brought against him unless he paid 17*l.* 10*s.*, the arrears due upon the five following calls:—

<i>Instalment.</i>	<i>Amount.</i>	<i>When made.</i>	<i>When payable.</i>
3rd.	£10 per cent.	20th Nov. 1837.	20th Jan. 1838.
4th.	10 "	15th Oct. 1838.	19th Jan. 1839.
5th.	10 "	17th Aug. 1839.	14th Sept. 1839.
6th.	20 "	16th Nov. 1839.	20th Jan. 1840.
7th.	20 "	6th Aug. 1840.	15th Sept. 1840.

It was proved that Messrs. Osborne & Ward, who had been appointed clerks to the trustees, were attorneys in partnership, and that the signature to the above letter was written by a clerk in their office. It was proved also, that, after the notice was given, the defendant had expressly promised to pay the first three of the calls mentioned in it.

5. It was objected, that the above notice so signed was insufficient, and that notice was necessary to maintain the action.—Overruled.

6. It was also objected, that the action should have been brought in case, under sect. 85.

The learned Judge overruled this objection also, reserving leave to the defendant to move to enter a nonsuit upon it, if the objection could be raised in this way. The jury found a verdict for the plaintiff.

In Michaelmas Term following, *Bompas*, Serjt., obtained a rule nisi for a nonsuit, or for a new trial, or to reduce the damages.

Erle and *Butt* shewed cause (a).—1. This agreement is not within the Statute of Frauds. By sect. 85, the trustees may call for the money when they choose, so that it is payable on request. Besides, the express promise to pay would cure the objection.

2. As to the keeping of the book under sect. 11, the words "at the end of the proceedings of the trustees at such meeting" do not mean the time when, but the place in the book where the signature of the chairman is to be affixed to the proceedings of the meeting at which he presided. *The Southampton Dock Co. v. Richards* (b) is expressly in point. *Regina v. The Mayor of Evesham* (c), which may be cited as inconsistent with it, was not so in fact, the question there being, whether, under the circumstances, there was ground for issuing a mandamus.

3. The swearing in of the trustees appears distinctly from the book taken altogether. It does not, indeed, appear by whom the oath was administered, but it was at a meeting at which trustees must have been present. Even if it were not, the proceedings would not be void: *Rex v. The Justices and Treasurer of Herefordshire* (d), *The Margate Pier Co. v. Hannam* (e). Besides, sect. 5 makes valid the acts of trustees, though not duly qualified.

4. The order to pay to the account of the treasurer at his bank is sufficient. It merely specifies the place of payment, which might have been his house. Besides, this objection also is cured by the promise to pay.

5. The notice is unnecessary; if not, that also may be inferred from the promise. But sect. 85 requires no notice; where the act does so, it expressly mentions it (f).

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(a) Nov. 21st, 1842.

(b) *Anté*, Vol. 2, p. 215; 1 M. & G. 448.

(c) 8 A. & E. 268.

(d) 1 Chitt. R. 700.

(e) 3 B. & A. 266.

(f) Sect. 35 requires notice to the trustees of a refusal to accept an offer for lands taken, and to the parties interested in the lands of the inquiry. Sect. 43 requires notice of complaint of da-

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6. Sect. 85 gives the option of debt or case as the form of action. But, without that, it would lie on the statutory advantage given: Com. Dig., "Debt," (A.9); *Anonymous* (a). Besides, this is not ground of nonsuit.

Bompas, Serjt., and *Manning*, Serjt., contra.—1. As to the Statute of Frauds, they cited *Boydell v. Drummond* (b), but abandoned the objection on the intimation of the Court that it was unteuable.

2. The book should be signed as soon as the minutes are entered, which ought to be at the meeting where they are put: that is the best way of providing for their authentication, which is the object of the signature. As to *The Southampton Dock Co. v. Richards* (c), when that case was decided, the previous decision of this Court in *Regina v. The Mayor of Evesham* (d) was not cited, where, upon less precise words in a statute, it was held that the words of the act implied that the minutes should be drawn up and signed at the time of the meeting.

3. By sect. 6, the oath taken and subscribed by the trustees must be entered in the book—(not the fact of its having been taken, but the oath itself. But, in the only place in this book where the oath is entered and subscribed, there is no entry of the time of swearing or of the person administering it. Sect. 5 refers to the qualification of the trustees, not the oath.

4. The order to pay calls must be to the treasurer only, by sect. 85. He alone could give a receipt for the money. It is not enough, therefore, that the order should be to pay to Mr. Miles the treasurer, but to him as treasurer, otherwise a payment to his private account would be a

mage; sect. 45 notice to tenant at will, &c. to give up possession of lands, &c.

(a) 6 Mod. 27.

(b) 11 East, 142.

(c) Antè, Vol. 2, p. 215; 1 M. & G. 448.

(d) 3 B. & A. 268.

compliance with the order. Then, if the call was improperly made, the promise to pay, being without consideration, would not cure the objection.

5. A notice of a call is clearly necessary, otherwise a party might, from absence or other causes, know nothing of the meetings and resolutions of the trustees, and yet be liable to an action.

6. Debt is not maintainable where a party has only agreed to *lend*; otherwise two parties would be in debt to each other on the same contract. Case is the proper remedy where money has not been paid in pursuance of the requisitions of a statute: *Cane v. Chapman* (a). This objection may be taken on application for a nonsuit, as the plaintiff may be supposed to withdraw himself from the trial if he find an objection on the record: *Sadler v. Robins* (b).

Lord DENMAN, C. J.—The objection upon the Statute of Frauds being abandoned, the first objection to be considered is, that the book which was produced on the trial was not evidence, because it was not signed by the chairman in the manner required by sect. 11, under which he is to subscribe his name at the end of the proceedings of the trustees at each meeting. I am of opinion we are bound, by the authority of the Court of Common Pleas in *The Southampton Dock Co. v. Richards* (c), to say this subscription has sufficiently complied with the act of Parliament. I think it impossible to distinguish the language of this act from the language of that upon which the Court pronounced that opinion; and that, on such a point, authority ought to have great weight. I certainly do not mean to question or invalidate any decision we may have come to; if we had decided the same point in a different manner, it is probable we might consider ourselves bound by our own

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(a) 5 A. & E. 647.

(b) 1 Campb. 253.

(c) Antè, Vol. 2, p. 215; 1 M. & G. 448.

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view. But besides a distinction which might be taken between the language of the two statutes, the difference between this case and the case of *Regina v. The Mayor of Evesham* (a) is, that there we thought both parties were in fault, that being a particular circumstance which would guide our discretion in granting or refusing a mandamus, and therefore it was less necessary to look minutely at the course of proceedings required by the act. I do not feel, therefore, that we are bound by what was done in the Court of Common Pleas.

The next objection is, that these parties cannot be considered as trustees at all, as they have not been sworn. Inasmuch as we are all clearly of opinion that the proceedings are not to be set up by the validating clause, as the oath seems to be exempted from its operation, and is not made a ground of the qualification generally, we must consider whether these parties are or are not sworn according to the act of Parliament. I think it appears that they are. The oath is a declaration that they will fulfil the duties of their office. The form of the oath, given on the blank page of the book, is signed successively by all the trustees, and there is from time to time an entry in the course of the proceedings shewing what trustees signed upon each particular occasion. I think there cannot be any reasonable doubt but that it is a proper record that all that is necessary to the oath having been properly taken according to the act has been complied with.

The fourth objection is, that there was no proper call. The calls are to be paid, not to Mr. Miles as treasurer, but to the credit of Mr. Miles, being treasurer. But, as the order states him to be the treasurer, I think it clearly intends he is to be paid in the character of treasurer; and, without looking to the individual in any degree, one cannot help seeing that the mode in which he is trusted is

(a) 8 A. & E. 266.

least liable to abuse, and would be most likely adopted ; so that the money, to get into the possession of the treasurer, is to be paid into his hands in a particular form.

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Then, as to the objection, that there was no notice according to the 109th section,—certainly there was none signed by the trustees, and it appears there is none signed by the clerk or clerks by order of the trustees,—I think the persons called upon to pay the money by virtue of the act of Parliament, according to the application that is made, have a right to know distinctly the authority that calls upon them. That, as it appears to me, is the object of the 109th section ; and, therefore, I think there was no sufficient notice here. This is not signed either by the trustees or by the persons appointed as clerks by the trustees, but by some person deputed by them, who, in fact, appears to have been in the employment of their firm as attorneys. The order of the trustees not being at all in question, very little evidence would be sufficient, when the facts would lead the jury to believe that the notice of it had been given. But, I think, on the evidence that has been given here, the verdict ought to have been for the defendant on the issue that introduces this fact. It is suggested that all these objections may well be, and yet there would be a waiver of them by the express promise to pay the three first calls. My opinion is, that is not so. A promise, taken by itself, may be evidence that all that was done was regularly and properly done ; but when we know all that has been done, and that that is insufficient to comply with the act of Parliament, I think the objection is not removed by the promise.

The next question is as to the form of the action. I do not think it important to inquire whether a rule to enter a nonsuit is the proper mode of giving effect to this objection ; on that ground I feel inclined to agree with my Brother *Manning*, that the question may be raised in this way, as the plaintiff may be supposed to withdraw himself

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from the trial if the action be misconceived. Certainly, the practice has been to take the opinion of the Judge at Nisi Prius on questions of this nature; and I see no objection to this course. But, in this case, I do not think it important to inquire whether there was duly leave reserved to move for a nonsuit on an objection on the record, because I think it is no objection in point of law at all. I have no doubt whatever that the meaning of the clause, which gives the power of bringing an action for calls either of debt or case, (not saying "as the case may be"), intends to give the option of debt or assumpsit, possibly of tort also, as many circumstances may be supposed of consequential injury, where the parties might be put to great inconvenience and suffer great injustice by reason of the breach of those particular enactments. I admit it may be difficult to make a man a debtor in this way, who promises to lend money, and does not lend it; but I think the act removes the difficulty, by saying it may be debt or case, at the option of the trustees, who may bring either one or the other.

WILLIAMS, J.—Upon several of the points that have been urged, I do not intend to say a single word. I do not see that I could add anything, as to the effect of a promise, when the fact, the ground on which the promise is made, is known and shewn to be insufficient. With regard to the payment in this case to the treasurer, I shall not say a word, nor indeed upon the form of the notice. The point that has been made the most of, and on which the greatest discussion has arisen, is that with regard to the necessity of the chairman signing the proceedings at the end of each meeting. That has been construed to mean the meeting of each day. I beg to be understood as giving no opinion upon this point expressly, or upon the authority of the case decided in the Common Pleas, *The Southampton Dock Co. v. Richards (a)*; and for these reasons: because,

(a) Antè, Vol. 2, p. 215; 1 M. & G. 448.

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when I find a decision of another Court precisely upon the point, I cannot help thinking that is a strong reason for giving an opinion to the same effect; and I have in vain attempted to make a successful distinction. If there is any difference between the cases as to the effect of the language, I think this appears to be the stronger of the two, as there the language was, "at each respective meeting." Now I think it impossible, in the language of this act of Parliament, to find anything that is more strong to shew it should be done at the end of each day than that.

Then, as to the oath, I perfectly agree with the interpretation put on that also. It is true that there is no jurat by which it would have appeared that the oath was administered by the trustees as the act of Parliament requires; and it is contended that that ought to have appeared; but although that is not so, there is certainly some evidence, for the trustees signed the oath seriatim; and, moreover, in the formal entry of the proceedings, there is an attestation or statement that the oath had been taken by each of these respective persons: therefore, as it seems to me, it is only a fair presumption that everything has been rightly done.

I do not think we are called upon to pronounce an opinion positively one way or the other, whether the objection as to the form of action is or is not a proper ground of nonsuit here. I quite agree that debt will lie in this case. This is entirely a statutable right of action; it is founded specifically upon the statute, and nothing else: and although there may be no agreement bearing on the face of it an absolute statement of a debt, I do not know that, therefore, it is to be inferred, that, under the express words of the act of Parliament, it does not assume a form which would be the foundation of an action of debt. I do not admit, as it has been urged, that the statute says it may be in debt or case, secundum

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subjectam materiam. I think, on the other hand, it is an express option, and that the two remedies are open to them.

COLERIDGE, J.—First, as to the sufficiency of the evidence of the swearing. I understand the facts to be these: In this book, which we must suppose, for the purpose of the argument, to be in evidence, the form of the oath, according to the act of Parliament, is set out; and really the object and effect of that is, that the particular trustees on each occasion may subscribe their names. There are, as I understand, to be found, in other pages of the book, entries respecting each of these trustees at certain meetings: I think it immaterial that the signature is in a different page. Now the substantial objection taken is this, that it does not appear that the oath has been administered by a person properly qualified. Upon that, I agree that we must assume it was duly administered.

Then, with regard to the direction to pay the calls, the act of Parliament requires the payment to be made into a bank, to be placed to the account of A. B., the treasurer. Suppose A. B. to have been an entire stranger, not a partner in the bank; we must look to the ordinary course of dealing in these matters, and we must suppose that account would be headed "A. B., the treasurer" &c., who was to have the care of that account; and if you have a payment made to the account of a particular person as treasurer, that is a payment to him. It seems to be quite equivalent to paying to him as treasurer; and when my Brother *Manning* put it, that there might be no book of account with Philip John Miles, and therefore any payment made to him would go to the credit of the general account, the answer is, that as treasurer he is to have an account.

But, however that may be, the objection that lies at the very root of all is, whether or not this book is to be admitted as evidence? I own, upon this I have felt a great diffi-

culty, but I have ultimately come to the same conclusion as that to which the rest of the Court have arrived. It would be very mischievous to have two conflicting decisions upon a matter of this sort: clauses similar to this, though perhaps not worded exactly as this is, are constantly occurring in a great number of statutes with which we have to deal, containing law to be administered by trustees, by magistrates, and commissioners of various descriptions; and I think it is better that there should be one understanding upon the subject; and, therefore, whatever I might think re integrâ, unless I can find some clause in this act of Parliament by which we should be authorised to say that the decision in the Common Pleas should not be upheld, or that it is an unreasonable decision, I think we ought to be bound by it, especially as I am not satisfied that it is a wrong or unreasonable decision. I have looked with great attention to the clauses of the act of Parliament, to see whether, apart from all authority, we could be clearly satisfied of what the intention was. It turns on what meaning is to be given to the words "at such meeting." It is said, if construed in a particular way, those words "at such meeting" would have no meaning at all. In fact, one hardly knows what meaning is to be attributed to them, unless you read them in this way—that the chairman at each meeting of trustees is to put his name at the end of the proceedings. If you take it they are first to enter the proceedings of the trustees, and that then the chairman must sign when the labours of the day are over, it would be necessary to put an end to the proceedings before it could be signed. And, I think, when we find words of such a doubtful meaning, we are bound to give them a decision conformable to what has before been pronounced. As for the supposed discrepancy between the decision of the Common Pleas and that of this Court in *Regina v. The Mayor of Evesham* (a), upon which a good deal of argument has been

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(a) 8 Ad. & E. 266.

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raised, though they are, perhaps, not quite reconcilable, I do not think we go in the way of that decision in deciding this; because it must be remembered that the Court, in refusing a rule for a mandamus, may have many points before them, all of which may enter into their consideration. It is totally unlike a matter brought before them upon a civil action. Looking at all the circumstances of that case, it is clear the objection to the mandamus was not on that ground only; therefore I do not see that it can be said that that judgment at all affects this, and that we may not consistently stand on the authority of the case in the Common Pleas.

The next point is as to the question of notice,—whether a notice to the person to pay is necessary under the act, not whether it is necessary at common law. I am of opinion, that though there is a clause directing payment to be made when the calls shall be made, and a clause authorising the calls to be made, there being no express mention of notice; yet, under the general words of the section, “shall neglect or refuse to pay,” though they are very large, a notice is necessary. Justice and common sense require it: non-resident shareholders obviously must have it. Then, if a notice is to be given, the next question is, whether the notice proved corresponds at all with the notice the act requires. That is to be a notice signed by three or more of the said trustees, or, if not by them, by the clerk or clerks to the trustees; that is to say, if the trustees are not able to do it themselves, they are to employ and order their clerk to do it for them. It is not like the ordinary case of a clerk being at all times allowed to sign under a general authority for him so to do; but there is a clerk which the clause seems to substitute specifically for the trustees to do this act. Here we have notices signed “Osborne & Ward,” not written by themselves, the clerks to the trustees, but by their clerk, signing under a general authority given to him in their office of attorneys; that being an attempt, in my opinion, to substitute a de-

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puty for a deputy, which there is no authority for doing. I have some doubt whether the promise to pay would not override this objection; but as I am alone in that opinion, I concur with the rest of the Court in making the rule absolute on this ground.

The last matter is, whether this is a right form of action. If I were called upon to decide that matter, I should be rather disposed to think that case would be the proper remedy at law. But there are two grounds upon which, to my mind, that becomes unimportant; the first is, as my Brother *Williams* put it, that there is a pure discretion given to the party,—that the Legislature, in framing this, had no reference to the particular nature of this or that sort of agreement, the act seeming to have thought fit not to compel a person to pursue a particular remedy. The fact is, that leave was not given in the large form that is stated for, but only if we should consider it open to non-suit under the circumstances. It is left to this Court as a matter of opinion, and I think the more proper mode of deciding it is to grant a new trial.

Rule absolute for a new trial.

THE cause came on for trial a second time at the Bristol Summer Assizes, 1843, before *Coleridge, J.*, when the plaintiff's evidence was confined to the three first calls (a), and an express promise by the defendant to pay them was proved. No evidence was given of an order of the trustees to give the notice of calls, nor of the notice; but on the part of the defendant, a notice, dated 21st December, 1837, relating to the first case, was put in, which was signed "*Osborne & Ward*," and was proved to have been written

(a) *Antè*, p. 676.

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by one of their clerks. It was also proved that Mr. Ward was not in the habit of signing such notices, the business of the trust being managed by Mr. Osborne. The learned Judge told the jury, that a notice signed by one of the clerks to the trustees in the name of both was sufficient, and that it was not necessary for the plaintiff to prove a specific order of the trustees to give such notice, as it was to be presumed, from the promise of the defendant, that the requisite authority was given, and that a notice signed by one at least of the clerks was served in each case. The jury found a verdict for the plaintiff for the amount of the three calls.

In the Michaelmas Term following, *Bompas*, Serjt., obtained a rule nisi for a new trial, on the ground of misdirection, or for arresting the judgment because the declaration did not aver that the trustees had ordered notice of the calls to be given.

Butt and *Carrow* now shewed cause (a).—First, it is objected that the notice of the calls should have been signed by both the clerks individually. But the signature of one for both is sufficient, as they hold a joint office; as in a demise by joint tenants notice to quit signed by one is good. In the former trial, the notice of the calls, which was proved, was signed by a clerk in the office for the clerks to the Company. But here there was evidence from which to infer that it was rightly signed, as the promise to pay subsequently made by the defendant is an admission that everything was right up to that time. [*Patteson*, J.—If there is no evidence to contradict it.] In *Lundie v. Robertson* (b), it was held that a promise by the indorser of a bill to pay it, was *primâ facie* an admission of the due presentment of the bill, of its dishonour, and that notice of it had been given to the indorsee. In *Gibbon v. Cog-*

(a) May 22nd.

(b) 7 East, 231.

gon (a), a similar promise by the drawer of a foreign bill was held sufficient evidence of a protest for non-payment, and of notice of dishonour; and in *Crozon v. Worthen* (b), presentment of a promissory note was proved in the same manner.

Secondly, the notice might have been given by the clerks in the ordinary course of their duty after the order for making the call; at all events, it was not necessary that the order for the notice should be entered in the book. Sect. 11 is merely directory, and, for such a purpose as this, which required no particular formality, a verbal order was as good as a written one. In *Taylor v. Clemson* (c), a payment made from the funds of a Company in the regular course of business, without a formal order, was supported; and, at all events, after verdict it will be presumed that such order, if necessary, was given.

Manning, Serjt., *contrà*.—It is necessary that the notice should have been given under an order of the trustees, and that order should be in writing, and entered in the book under sect. 11. It is contended that the clerks may do anything executory to carry out the order for calls. It is true, that the declaration does not in terms say an order was made by the trustees; but if it does not by implication, it is faulty and bad. The public are not to be bound by such a proceeding. [*Coleridge*, J.—Not the public, but the subscribers. Suppose the declaration had stopped at the words “due notice,” without the words under the *videlicet*, there would be no opposition between the part relied upon and the part expressed.] That might have been sufficient except upon special demurrer; but the words “due notice” are limited by what follows, which excludes the notice given by the trustees. The promise

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(a) 2 Campb. 188.

(b) 5 M. & W. 5.

(c) *Antè*, p. 65; 2 Q. B. R. 978.

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to pay either admits something within the defendant's knowledge or a waiver; the admission may be of some notice, not saying whether it was good or bad. As to the necessity for the two clerks concurring in signing, the inconvenience is the fault of the trustees. They are one body, and might well confide their authority to two clerks, considering one would be a check on the other. The cases cited, therefore, do not apply; and *Taylor v. Clemson* (a) is now before the House of Lords on a writ of error.

The record should shew that every step has been properly taken. A notice, unauthorised by the trustees, would not make the defendant liable.

Lord DENMAN, C. J.—With regard to the question, whether there is any ground for arresting the judgment in this case, it appears to me that the statement in the declaration is perfectly sufficient. It is alleged, that the order to pay the call was made by the trustees, and that the defendant had due notice of the said order of the trustees.

As to the proof of due notice, I am of opinion, that, if the defendant has subsequently promised to pay the money, he has given evidence against himself, that up to that time everything was rightly done. Even if he did not know the facts, every person who makes such a promise is presumed to have knowledge of such facts as will give effect to everything necessary to carry out what he promises. As to the objection, that the book shewing the order of the trustees was not produced, that was met by the remark, that all orders are not required to be in writing; for many slight things a formal order would be unnecessary, and sect. 11 does not make the book the only evidence: non constat that the defendant was not present at the making of the order.

As to the signature of the notice by the clerk, I think

(a) *Antè*, p. 65; 2 Q. B. R. 978.

this is sufficient. The plaintiff says, "I charge you with promising to pay after having received due notice." That is set out in the declaration. The defendant may have received other notices unduly signed, but as he has promised, I think the learned Judge was warranted in his direction to the jury, that, after such promise, they might presume that all that was done before was right.

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PATTESON, J.—I am of the same opinion. The declaration states that the call was made by order of the trustees, and that notice had been duly given to the defendant. After that, I think it would not be necessary to state that the notice was given by order of the trustees, even on demurrer, still less after verdict.

As to the evidence, I agree that sect. 11 does not mean that the omission of inserting it in the book makes the step invalid: other evidence may be given of it.

Then, is the promise sufficient to raise the presumption of due notice having been given? The notice may have been either by the trustees or the clerks, and it is contended, because a particular sort of notice was given, the promise is no proof of any other. But I think it raises quite enough for the jury to conclude that everything was rightly done.

WILLIAMS and COLERIDGE, Js., concurred.

Rule discharged.

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COURT OF QUEEN'S BENCH.

In Hilary Vacation, 1844.

Feb. 8th.

CARPUE v. THE LONDON AND BRIGHTON RAILWAY COMPANY.

By a Railway Act (7 Will. 4 & 1 Vict. c. cxix) a Company were empowered to make a railway, which all persons were to have liberty to use on payment of certain tolls. The Company were also empowered to provide and charge for the use of locomotive engines on the railway, and to use locomotive engines and car-

riages for the conveyance of passengers, goods &c., and to charge for such conveyance. Sect. 253 provides that no action or proceeding shall be prosecuted against any person &c. for anything done or omitted to be done in pursuance of the act, or in the execution of the powers or authorities given by it, without twenty days' notice in writing.

An action was brought against the Company in case for negligence. The declaration stated, that they were owners of the railway and carriages used by them for the conveyance of passengers along it for reward, and, being such owners, the plaintiff, at their request, became a passenger in one of the carriages for reward to them, and they received him as such passenger, and that it became their duty to use due care and skill in conveying him.—Breach, that they did not use due care and skill, but took so little care, and so negligently &c. conducted themselves in carrying him and managing the carriage in which he was passenger, the train to which he was attached, and the engine by which it was drawn, that the carriage was thrown off the rails, and the plaintiff injured.

Held, that no notice of action was necessary, as the Company were sued only as carriers, and not for anything done or omitted in pursuance of the act; and that, although it was proved that the rails were defective at the place where the accident occurred, so that the rate at which the train was travelling was hazardous.

Seemle, that, in proving that the train and railway were exclusively under the management of the Company when the accident occurred, the plaintiff made out a *prima facie* case of negligence, it being for the defendants to disprove negligence in such a case, rather than for the plaintiff to prove it.

being owners and proprietors of the said first-mentioned railway and the said carriages for the purpose aforesaid, the plaintiff, heretofore, and before the committing of the said grievances, and before the commencement of this suit, to wit, on the 2nd day of October, 1841, at the request of the said Company, became and was a passenger in one of their said carriages, to be by them safely and securely carried and conveyed thereby on a certain journey, to wit, from London aforesaid to Brighton aforesaid, for certain reasonable reward to the said Company in that behalf; and the said Company then received the plaintiff as such passenger as aforesaid, and thereupon it became and was the duty of the said Company to use due and proper care and skill in and about the carrying and conveying the plaintiff on the said journey, to wit, from London aforesaid to Brighton aforesaid; yet the said Company, not regarding their duty in that behalf, did not use due and proper care and skill in and about carrying and conveying the plaintiff on his said journey, but took so little care, and so negligently and unskilfully conducted themselves in and about carrying and conveying the plaintiff on his said journey, and in conducting, managing, and directing the carriage in which the plaintiff was such passenger as aforesaid, and the train to which the same was attached, and the engines whereby the said train was drawn upon and along the said Company's said railway, that, by reason of such want of care and skill of the said Company, the carriage which contained the plaintiff was then thrown and cast with great violence from and off the rails of the said last-mentioned railway, and was then overturned, crushed, and broken to pieces, and thereby the plaintiff was thrown out of the said carriage with great violence, and was grievously bruised, wounded, and injured, and also, by means of the premises, the plaintiff became and was sick, sore, lame, and disordered, and so remained and continued for a long time, to wit, hitherto, during all which time the plaintiff

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suffered and underwent great pain, and was hindered and prevented from transacting his necessary and lawful affairs by him during all that time to be performed and transacted, and lost and was deprived of divers great gains and profits and advantages which he might and otherwise would have derived and acquired in his profession of a surgeon, and thereby also the plaintiff was forced and obliged to, and did then pay and expend divers monies, amounting in the whole to the sum of £200, in and about endeavouring to be cured of the said bruises, wounds, and injuries, and hath been and is, by means of the premises, otherwise greatly injured and damnified &c.

Plea—Not guilty.

At the trial, before Lord *Denman*, C. J., at the Midsummer sittings after Easter Term, 1842, it appeared that the accident happened while the plaintiff was travelling in one of the Company's carriages from London to Brighton; that the position of the rails had been somewhat deranged at the place where the injury took place; and that the train was proceeding at a rate which was dangerous, considering the state of the rails. For the defendants, it was contended, that, by their act, 7 Will. 4 & 1 Vict. c. cxix (a),

(a) Sect. 1 incorporates the Company by the style of "The London and Brighton Railway Company."

Sect. 3 and subsequent sections empower the Company to make the railway, and give the ordinary powers of taking lands, &c.

Sect. 30 enacts, "That, if the said railway or any part thereof shall at any time hereafter be abandoned or given up by the said Company, or, after the same shall have been completed, shall, for the space of three years, cease to be used and employed as a railway, then and in such case the lands so purchased or taken by the said Com-

pany for the purposes of this act or otherwise, and the parts thereof over which the said railway or any part of such railway which shall be so abandoned or given up by the said Company, shall pass shall vest in the owners for the time being of the land adjoining that which shall be so abandoned or given up, in manner following; that is to say, one moiety thereof in the owners of the land on the one side, and the remainder thereof in the owners of the land on the other side thereof."

Sect. 194 enacts, "That all persons shall have free liberty to pass

they were entitled to twenty days' notice in writing of the action. This not being proved, the Lord Chief Jus-

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along and upon, and to use and employ the said railway, with carriages properly constructed as by this act directed, upon payment only of such rates and tolls as shall be demanded by the said Company, not exceeding the respective rates or tolls by this act authorised, and subject to the rules and regulations which shall from time to time be made by the said Company, or by the said directors, by virtue of the powers to them respectively by this act granted."

Sects. 195 and 196 regulate the tolls which the Company may demand for goods, passengers, &c., conveyed on the railway.

Sect. 197 enacts, "That it shall be lawful for the said Company, and they are hereby empowered, to provide locomotive engines and other power for drawing or propelling of any articles, matters, or things, persons, cattle, or animals, upon the said railway, and also upon and along any other railway communicating therewith, and to receive, demand, and recover such sums of money for the use of such engines or other power as the said Company shall think proper, in addition to the several other rates, tolls, or sums by this act authorised to be taken."

Sect. 198 enacts, "That it shall be lawful for the said Company, and they are hereby authorised, to use locomotive engines and other moving power, and, in carriages drawn or propelled thereby, to

convey upon the said railway, and also upon any other railway communicating therewith, all such passengers, cattle, and other animals, goods, wares, and merchandize, articles, matters, and things as shall be offered to them for that purpose, and to make such reasonable charge per mile for such conveyance as they may from time to time determine upon, in addition to the several rates or tolls by this act authorised to be taken: Provided always, that it shall not be lawful for the said Company, or for any person using the said railway, to charge, for the conveyance of any passenger upon the said railway, any greater sum than the sum of threepence halfpenny per mile, including the rate or toll hereinbefore granted."

Sect. 253 enacts, "That no action, suit, or information, nor any other proceeding, of what nature soever, shall be brought, commenced, or prosecuted against any person or corporation for anything done or omitted to be done in pursuance of this act, or in the execution of the powers or authorities, or any of the orders made, given, or directed in, by, or under this act, unless twenty days' previous notice in writing shall be given by the party intending to commence and prosecute such action, suit, information, or other proceeding, to the intended defendant, nor unless such action, suit, information, or other proceeding shall be brought

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tice reserved leave to move for a nonsuit. His Lordship alluded to the evidence as to the state of the rails, and told the jury, that they must be satisfied that the accident had been occasioned by the negligence of the defendants; and that, as the exclusive management of the railway and machinery was in their hands, it was to be presumed that the accident arose from their want of care, unless they gave some explanation of the cause, which the plaintiff could not be expected to give, not having the same means of knowledge. The jury found a verdict for the plaintiff. In Hilary Term, 1843, Sir *W. Follett*, Solicitor-General, obtained a rule nisi for a nonsuit, on the ground of the want of notice; or for a new trial for misdirection, in telling the jury that it was for the defendant to disprove negligence rather than for the plaintiff to prove it (a).

Sir *F. Pollock*, Attorney-General, *Hayes*, and *Attree*, shewed cause (b).—The question is, whether the matter complained of is within the 253rd section of the act. The protection claimed here was never intended, but was to be confined to powers in making and maintaining the railway, not to the use by the Company, in common with others, of the road when finished: such a construction would be opposed to the general good. This is an action against the defendants, not as a Railway Company but as carriers, for they are mere carriers on the Greenwich and Croydon Railways, on which a part of the journey is performed; and it is impossible that there should be a different rule as to

or commenced within six calendar months after the act committed, or, in case there shall be a continuation of damage, then within six calendar months next after the doing or committing such damage shall have ceased; nor unless such action, suit, or information shall be laid and

brought in the county and place where the matter in dispute or cause of action shall arise.

(a) The latter ground was abandoned on the argument.

(b) January 12th and 13th, before Lord *Denman*, C. J., *Paterson*, *Coleridge*, and *Wightman*, Js.

safe carriage on one part of the journey and on another. If a coach accident occurred from fast driving over a part of the turnpike-road, which was dangerous from want of repair, it would be no answer to an action against the coach proprietor to say, that the commissioners of the road might be sued and were entitled to notice of action. The same principle holds here, where the carrying business was improperly conducted with reference to the state of the railway. The Company are responsible as carriers, as they knew, or had means of knowing, that the state of the railway demanded greater care and caution. They are not compelled to become carriers, though they may be compelled to keep the railway in repair for such a purpose; but they may abandon it, when the land, by sect. 130, will revert to the original owners. The contract, therefore, the breach of which is complained of, to carry safely from London to Brighton, is not a thing done in pursuance of this act: *Carruthers v. Payne*(a), *Edge v. Parker*(b), *Wroth v. Budd*(c), *Fletcher v. Greenwell*(d). In *Palmer v. The Grand Junction Railway Company*(e), it was held, that, under a similar clause, a Railway Company were not entitled to notice of action against them for misfeasance as carriers. It is true, that, in that case, the damage was to goods, of which carriers are insurers; but the only difference is, that in that case negligence is presumed, in the case of passengers, it must be proved; therefore, if negligence be proved against them as carriers the case is out of the 253rd section. The only question is, whether there has been negligence? If not, their defence is under the general issue.

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Sir *W. Follett*, Solicitor-General, *Thesiger*, and *Swann*,
 contra.—The question is, whether this action is brought

(a) 5 Bing. 270.

(b) 8 B. & C. 697.

(c) 2 B. & Ad. 172.

(d) 5 Tyrw. 316.

(e) 4 M. & W. 749.

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against the defendants simply on the ground of their being carriers, and not as proprietors of the railway. If they unite the characters, which their act empowers them to do, they are liable under circumstances for which another carrier on the line would not be liable, and are therefore entitled to notice of action, even for negligence in carrying. In the course of the case at the trial much evidence was given as to the state of the road, which was proved to have been caused by the derangement of the rails. That was clearly a matter "omitted to be done" by the Company; as in *Smith v. Shaw* (a), a Company having power under a statute to direct the mooring and unmooring of vessels in their dock were held to be entitled to notice in an action brought against them for giving improper directions. [*Patteson, J.*—This is not an omission to do a thing, but doing it in a negligent and improper manner. Carrying passengers negligently is not an omission to carry them.] In *Palmer v. The Grand Junction Railway Company* (b), *Parke, B.*, says,—“If the action was brought against the Railway Company for the omission of some duty imposed upon them by the act, this notice would be required. If, for instance, it was founded on a neglect in not duly fencing the railway, on account of which the travelling on it was dangerous to those passing along it, assuming that such an obligation resulted from the 180th section, or from the general provisions of the act, that case would have fallen within the 214th section.” As to abandoning the railway under sect. 130, while the Company keep it open under the act, they must keep it in repair: *The Lancaster Canal Company v. Parnaby* (c).

Sir *F. Pollock*, Attorney-General, cited *Wallace v. Smith* (d).

Cur. adv. vult.

(a) 10 B. & C. 277.

A. & E. 230.

(b) 4 M. & W. 766.

(d) 5 East, 115.

(c) Ante, Vol. 1, p. 696; 11

Lord DENMAN, C. J., now delivered the judgment of the Court.—The only question for our decision in this case is, whether the defendants were entitled to notice of action under the 253rd section of their act.

For the necessity of such notice it was urged, that, as the declaration charged the injury done to the plaintiff to have arisen from the Company's omission to perform certain works required by the act of Parliament, the complaint was in substance a complaint of some act done or omitted to be done under the act, and therefore the action could not be maintained without notice. In support of this argument, the dictum of *Parke, B.*, in *Palmer v. The Grand Junction Railway Company* (a) was cited. The notice was not thought, in that case, to be necessary; but the learned Baron states, that, "if the action was founded on a neglect in not duly fencing the railway, on account of which the travelling on it was dangerous to those passing along it, assuming that such an objection resulted from the 180th section, or from the general provisions of the act, that case would have fallen within the 214th section,"—(the section requiring notice). "But, when the matter is looked at and explained," he says, "it appears that the action is not of that nature, but the defendants are sued as common carriers;" and then he comments upon the facts proved in that case.

In deference to that dictum, at the trial leave was given to move to enter a nonsuit, and a rule to that effect was granted and has been fully discussed before us. We are not, however, now called upon to consider how far the law laid down in that dictum is correct, because we think it is clear in this case, as the learned Baron thought in that, that the injury has arisen from the defendants' misconduct as carriers, and not merely as railway proprietors; although, in examining the evidence against them as carriers, it was impossible wholly to exclude some reference to the proof

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(a) 4 M. & W. 766.

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given as to the state of the railway. As the defendants are liable in their character of carriers, the Court thinks that no foundation exists for any argument in favour of the necessity of notice under the act. The plaintiff is therefore entitled to retain his verdict, and the rule for a nonsuit must be discharged.

Rule discharged.

COURT OF QUEEN'S BENCH.

In Hilary Term, 1844.

Jan. 31st.

THE QUEEN v. THE GREAT WESTERN RAILWAY COMPANY.

Where an application had been made for the costs of a mandamus upon an affidavit, intituled *The Queen v. The Directors of the Great Western Railway Company*, instead of *The Queen v. The Great Western Railway Company*, (their name of incorporation), the same mistake occurring in the body

IN Easter Term, 1843, Sir *F. Pollock*, Attorney-General, obtained a rule, calling upon the Great Western Railway Company to shew cause why a writ of mandamus should not issue, directed to them, commanding them to pay to the town-council of Maidenhead the sum of £2500 by way of compensation for the loss of bridge-tolls occasioned by the making of the railway.

By the 5 & 6 Will. 4, c. cvii, (the act incorporating the Company), it is enacted, (sect. 7), after reciting, "that the mayor, bridgemasters, and burgesses of the town of Maidenhead, in the county of Berks, under a local act (12 Geo. 3), have erected and hitherto kept in repair the bridge over the

of the affidavit, and the rule was discharged on that ground, the Court refused a second application made upon the same affidavit amended in this particular, the amendment being required in the body of the affidavit, and not merely in the title or jurat.

Thames called Maidenhead Bridge, and are bound by the provisions of the said act and several charters to keep the same in repair for ever; and have borrowed, by way of mortgage, upon the credit of the tolls granted by the said act, the sum of £19,000, which has been wholly expended upon the erection and repairs of the said bridge," &c., it is enacted, "that, if during the first three years, to be computed from the expiration of one calendar month immediately after the said railway shall be completed and open for public use, for a distance of thirty miles from the junction with the London and Birmingham Railway, there shall be an annual decrease in the receipt for tolls taken by the said mayor, bridgemasters, and burgesses, at the said bridge, as compared with the receipts during the three immediately preceding years, then and in such case the said Company shall pay to the said mayor, &c., a sum of money equal to ten years purchase of such annual decrease, taken upon an average of the three years during which the same shall occur, so as such sum of money shall not exceed the sum of £2500," &c.

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Sir *W. Follett*, Solicitor-General, on shewing cause against the rule, contended, that, as a subsequent act had passed, altering the terminus of the Great Western Railway, and not continuing the provision of the former act as to compensation for tolls, it was not intended to be retained. The Court, however, made the rule absolute for a mandamus, that the question might be raised on the return (a).

The mandamus issued accordingly. No return was made to it, and the money was paid by the Company, but no payment was made for costs or interest; whereupon a rule was obtained in Michaelmas Term, 1843, for the payment of the costs of and incident to the rules and writ of mandamus. When this rule came on to be argued, before *Wightman*, J., Nov. 24, 1843, it was discharged with-

(a) See the next case.

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out costs, on the ground that the affidavit on which it was obtained was intituled, "*The Queen v. The Directors of the Great Western Railway Company*," instead of "*The Queen v. The Great Western Railway Company*," their name of incorporation. The same defect also occurred in the *body* of the affidavit, wherever the defendants were mentioned in it.

A second rule nisi for the same purpose was subsequently obtained on the same affidavit, amended by striking out the words "The Directors of" wherever they occurred in the title and body of the affidavit.

Sir *W. Follett*, Solicitor-General, (*R. V. Richards* with him), now shewed cause.—The former rule in this case having been discharged for a defect in the affidavit, the same matter cannot be again brought forward on an amended affidavit. It is laid down distinctly in *Regina v. The Manchester and Leeds Railway Company* (a), as nearly an inflexible rule, that the Court will not allow a party to succeed on a second application, who has previously applied for the very same thing without coming properly prepared. It is true, that when the defect is merely in the title or jurat of the affidavit, the Court will allow the affidavit to be re-sworn and the motion renewed, as in *Rex v. The Justices of Warwickshire* (b), and *Regina v. Jones* (c), for defective titles; and in *Shaw v. Perkins* (d), for an error in the jurat; but, if the amendment is to be made in the body of the affidavit, a second application will not be allowed, even though the merits may not have been discussed on the first: *Regina v. Pickles* (e). If it were not so, it would be difficult to draw the line as to what amendments were or were not material. [He was stopped by the Court.]

(a) 8 A. & E. 413, 427.

(b) 5 Dowl. 382.

(c) 8 Dowl. 307.

(d) 1 Dowl. N. S. 306.

(e) 3 Q. B. 599, n.

Sir *F. Pollock*, Attorney-General, and *H. Hill*, contrà.

—In the former application the objection simply was, that there was no such cause as that in which the affidavit purported to be made, the mandamus being against the Company not the directors, and the rule was discharged on that ground. This is therefore the first application in this cause. If the correction in the title of the affidavit was allowable, there is nothing contrary to the spirit of the rule in admitting the correction in the body, when it is only made to correspond with the title, by altering the description of the party, which is an immaterial amendment. It is not like the case of an application made upon fresh materials. It is only when the materials are defective in substance that the discharge of a former rule is conclusive, not where there is a mere slip in form: *Sherry v. Oke* (a). [*Patteson*, J.—I am not sure that that decision was right; but I was very much influenced by the fact, that the parties had consented to the rule being enlarged, and afterwards raised a technical objection to the rule, which might have been cured if taken before it was enlarged.] At all events, the Court will look at the substance of the alteration, to see if it is material.

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Lord DENMAN, C. J.—The latitude allowed in *Sherry v. Oke* (a) may perhaps be questionable. In that case, however, there were particular circumstances, which might induce us to exercise a power, which we do not mean wholly to repudiate, of allowing a second application where the interests of justice require it. But the general rule is that which was laid down in *Regina v. The Manchester and Leeds Railway Company* (b). There is this exception to it, where the alteration would be simply in the form of the title or jurat, and reswearing the affidavit would clearly leave the parties before the Court in the same situation in which they were before: there a second application may be made on

(a) 3 Dowl. 349.

(b) 8 A. & E. 413, 427.

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the amended affidavit. If, however, it would be necessary to alter the body of the affidavit to cure the objection, the Court will not inquire into the extent of the alteration required. The prosecutors here do not come within the exception; to make their application admissible, we have to look at the particulars of the affidavit and its history, and an ingenious discussion is required. The general rule is simple, and the exception convenient and easily applied. If we allow of alterations beyond its limit, we impose difficulties on ourselves, and tempt suitors into inaccuracy, and consequently multiplied litigation.

PATTESON, J.—I am of the same opinion: and think, that it will be safe to adhere to the rule, that motions on the amendment of affidavits should be allowed only where the alteration is for a defect in the title or jurat. I believe I went too far on this point in *Sherry v. Oke* (a), though no injustice was ultimately done by the decision.

COLERIDGE, J.—To relax the rule in the manner contended for would lead to infinite variations. As to the suggestion that a different cause is before us, the very cases, in which an alteration of title has been deemed an exception to the rule, shew, that the cause in such cases has been considered still the same. The mere alteration in the title would not make this an application in a different cause. It is clear that the application and parties are the same in both rules,

WIGHTMAN, J., concurred.

Rule discharged.

(a) 3 Dowl. 349.

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COURT OF QUEEN'S BENCH.

*In Trinity Term, 1844.*The QUEEN v. The HULL AND SELBY RAILWAY COMPANY. *May 27th.*

IN Easter Term last, *Watson* obtained a rule, calling upon the Hull and Selby Railway Company to shew cause why a mandamus should not issue, commanding them forthwith to pay to the Company of Proprietors of Selby Bridge the sum of £2500, pursuant to the 6 & 7 Will. 4, c. lxxx.

He moved upon affidavits, which stated, that, by the 31 Geo. 3, c. lx, certain persons were incorporated by the name of the "Company of Proprietors of Selby Bridge," and empowered to build and maintain a bridge over the River Ouse, near the ferry of Selby in Yorkshire; and were empowered by that act, and the 43 Geo. 3, c. xlviii, to take certain tolls for pontage before any passage over the said bridge should be permitted, and that they had built the bridge, and had levied and were still receiving tolls.

That, by the 6 & 7 Will. 4, c. lxxx, "for making a railway from Kingston-upon-Hull to Selby," the defendants were incorporated by the name of "The Hull and Selby Railway Company," and were empowered to construct a railway and other works, including a bridge over the Ouse, partly in the township of Selby, and to take tolls for the use of such railway and works.

By a railway act, 6 & 7 Will. 4, c. lxxx, empowering a Company to make a railway and to build a bridge over a river, it was recited that the construction of the bridge might affect a reduction in the amount of tolls received by the proprietors of a neighbouring bridge, and therefore enacted, that if, during the first three years from the opening of the railway for public use, there should be an annual decrease in the tolls of the latter bridge, as compared with the receipts during the three immediately pre-

ceding years, then the Railway Company should pay to the proprietors of the bridge a sum equal to ten years' purchase of such annual decrease, taken upon an average of the three years during which the same should occur. The decrease having taken place, and a claim made for compensation:—*Held*, that an action of debt lay against the Railway Company for the amount; and the Court refused to grant a mandamus to compel the payment.

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That, by sect. 154, reciting the statutes 31 Geo. 3, c. 60, and 43 Geo. 3, c. xlviii, and reciting "that whereas the construction of a railway bridge across the River Ouse, for the passage of carriages over the same, near to the said Selby Bridge, may effect a considerable reduction in the amount of tolls received by the said Company of Proprietors of Selby Bridge, whereby the said Company might be disabled from effectually supporting and maintaining in repair the said bridge," &c. ; it was enacted, "that, if during the first three years, to be computed from the expiration of one calendar month immediately after the whole line of the said railway shall be completed and opened for public use, there shall be an annual decrease in the receipts for tolls taken by the said Company of Proprietors of Selby Bridge at the said Selby Bridge, as compared with the receipts during the three immediately preceding years, then, and in such case, the said Railway Company shall forthwith pay to the said Company of Proprietors of Selby Bridge a sum of money equal to ten years' purchase of such annual decrease, taken upon an average of three years during which the same shall occur, so as such sum of money shall not exceed the sum of £2500;" (and so as to the next three years,) "which sums, or such of them as shall become payable, shall be accepted in full satisfaction and discharge of all claims and demands whatsoever upon the said railway company by the said Company of Proprietors of Selby Bridge in respect of the said tolls, and as a full indemnification to the said Railway Company, and all persons acting under their authority, from and against all penalties and forfeitures whatsoever by the said recited acts, or either of them, imposed for carrying any person," &c., across the said river Ouse within the said township of Selby, &c., otherwise than over the said bridge."

That the whole line of the Hull and Selby Railway was completed and opened to the public on the 1st of July, 1840. On the 1st of August, 1843, the bridge proprietors

proceeded to investigate the accounts, and ascertained that the amount for the three years previous to the 1st of August, 1840, had been £3486, being an annual average amount of £1162; and that the amount for the three years subsequent to the 1st of August, 1840, was £2472, being an annual average of £824, leaving an average annual decrease of £338; ten years' purchase of which amounted to £3380; and that a demand of £2500, being the amount limited by the act, had been made on the Railway Company, but not paid.

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Erle and *Taprell* shewed cause (a).—A mandamus will not be granted in this case, as an action of debt will lie, and is therefore the proper remedy, as in *Corregal v. The London and Blackwall Railway Company* (b). [*Patteson, J.*, referred to *Regina v. The Great Western Railway Company* (c).] The objection was not raised in that case, which turned on its particular circumstances. There is no doubt that money due for a statutory remedy may be recovered in an action of debt. Com. Dig. Action upon Statute (A. 2). *Anonymous case* (d), *Tilson v. The Warwick Gas Light Company* (e), *Carden v. The General Cemetery Company* (f), *Hopkins v. Mayor &c. of Swansea* (g), and *Mayor &c. of Swansea v. Hopkins* (h). In *Cane v. Chapman* (i), an action in case was held maintainable for a breach of duty; and in *Rex v. The Nottingham Old Waterworks Company* (k), *Patteson, J.*, said, "If there be a specific remedy we cannot grant a mandamus." The principle, that, where debt will lie, or there is any other remedy, a mandamus will not be granted, is also recognised in *Regina v. The Victoria Park*

(a) May 6th, before *Patteson, Williams, and Wightman, Js.*

(b) Ante, p. 411; 5 M. & G. 219.

(c) Ante, p. 700.

(d) 6 Mod. 27.

(e) 4 B. & C. 962.

(f) 5 Bing. N. C. 253.

(g) 4 M. & W. 621.

(h) 8 M. & W. 901.

(i) 5 A. & E. 647.

(k) 6 A. & E. 355, 369.

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Company (a), and *Regina v. Hopkins (b)*. It is only where the remedy is not so effectual in any other proceeding that the Court will grant a mandamus: *Rex v. The Severn and Wye Railway Company (c)*.

Watson and H. Hill, contra.—The act requires the Railway Company to pay the money *forthwith*; and even if an action of debt would lie, it would not be an effectual mode of compelling payment forthwith by a levy on the engines, or by elegit. The property might be mortgaged by sect. 199. When a specific thing is required to be done, mandamus is the proper remedy, as in *Regina v. The Great Western Railway Company (d)*. If it were disobeyed, an attachment might issue against the Company; and even if it were not certain to be an effectual remedy, that is no answer to the application for a mandamus. *Regina v. The Eastern Counties Railway Company (e)*, *Tilson v. The Warwick Gas Light Company (f)*, and *Carden v. The General Cemetery Company (g)*, were cases of claims by private individuals for services rendered, where clearly mandamus would not be the proper remedy: so, also, in *Cane v. Chapman (h)*. *Hopkins v. The Mayor &c. of Swansea (i)*, was a case of an action on a bye-law, for which debt would properly lie. This act provides expressly a remedy by action of debt in some particular cases; as by sect. 156, for indemnity for damage in the construction of some of the works. That shews that no such remedy was contemplated in this instance. [*Patteson, J.*—That is only the ordinary inaccuracy of acts of Parliament.] In *Rex v. The Nottingham Old Waterworks Company (k)*, the Court questions the au-

(a) 1 Q. B. 288.
 (b) Id. 168.
 (c) 2 B. & A. 646.
 (d) Ante, p. 700.
 (e) Ante, Vol. 2, p. 260; 10 A. & E. 531.

(f) 6 Mod. 27.
 (g) 5 Bing. N. C. 263.
 (h) 5 A. & E. 647.
 (i) 4 M. & W. 621.
 (k) 6 A. & E. 363.

thority of Blackstone (*a*), where he says, that, "whatever the laws order any one to pay, that instantly becomes a debt which he hath beforehand contracted to discharge." In *Rex v. The St. Katherine's Dock Company* (*b*), the Court granted a mandamus to compel the payment of a sum of money by the Company, there being no other effectual remedy, as is clearly the case here.

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PATTESON, J., now delivered the judgment of the Court.—On considering this case, which was argued in the absence of the Lord Chief Justice, we are of opinion, that an action of debt on the statutory obligation will clearly lie, and that remedy would be equally efficacious as the remedy by writ of mandamus. In either case the amount must be assessed by a jury. In an action execution would go against the goods of the corporation, and a peremptory mandamus could only be enforced by distress on their goods. The present question was not raised in the argument in the case of *Regina v. The Great Western Railway Company* (*c*) at all. We are, therefore, of opinion, that the rule for a writ of mandamus must be discharged; but, inasmuch as the rule was granted in the case referred to, and therefore the parties might consider that a mandamus was open to them, the rule will be discharged without costs.

Rule discharged, without costs.

(*a*) 3 Bl. Comm. 158.

(*b*) 4 B. & Ad. 360.

(*c*) Ante, p. 700.

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COURT OF EXCHEQUER.

In Trinity Term, 1844.

June 7th. HALL v. The Company of Proprietors of the GRANTHAM CANAL NAVIGATION.

A canal act, 33 Geo. 3, c. xciv, s. 82, empowered a Company to take, for tonnage upon all coals, stones, timber, corn, &c., and other goods, wares, and commodities whatsoever, which should be navigated or conveyed upon the canal, certain rates and duties not exceeding the sum of 2½d. for every ton, on entering into or passing out of the canal; and also not exceeding the sum of 1½d. per mile for every

DEBT for money had and received by the defendants to the use of the plaintiff. Plea, never indebted. The cause was tried at the Lent assizes for the county of Nottingham, 1843, when a verdict was found for the plaintiff for 3*l.* 12*s.* 6*d.*, subject to the opinion of the Court upon the following case:—

The defendants had been incorporated by an act of Parliament of the 33 Geo. 3, intituled, “An act for making and maintaining a navigable canal from, or nearly from the town of Grantham, in the county of Lincoln, to the River Trent, near Nottingham Trent Bridge; and also a collateral cut from the said intended canal, at or near Cropwell Butler, to the town of Bingham, both in the county of Nottingham.”

In pursuance and under the authority of the said act, and soon after the passing of the same, the said canal, but

ton of coal, stone, timber, corn, &c., and other goods, wares, and commodities, *except* all dung, soil, marl, ashes, and other *manure*, (other than lime, which should pay half the said tolls), and except gravel, stone, or other materials for mending the roads, which should pass toll free, which should be navigated or conveyed upon the canal. Section 96 provided, that no boat or vessel should pass through any lock to be made under the act without the consent of the Company, unless such boat or vessel should pay a duty or rate equal to what would be paid by a vessel loaded with a burthen of thirty tons, unless waste water should be running over the regulating weir of such lock, or unless such vessel should be returning after having passed on the canal with a greater burthen than thirty tons:—

Held, that a boat laden with a burthen of *manure*, though greater than thirty tons, was entitled to navigate the canal, and to pass at any time through the locks, either going or returning, without payment of any toll.

not the collateral cut, in the said act mentioned, was constructed.

The 82nd section empowers the said Company of proprietors "to take for their own use and behoof, for tonnage upon all coals, stones, timber, corn, grain, malt, meal, flour, and other goods, wares, merchandize, and other commodities whatsoever, which shall be navigated, carried, or conveyed upon or through the said intended canal and collateral cut, such rates and duties as the said Company of proprietors should think fit, not exceeding the sum of $2\frac{1}{4}d.$ for every ton, on entering into or passing out of the said intended canal, at its junction with the river Trent; and also, not exceeding the sum of $1\frac{1}{4}d.$ a mile for every ton of coal, stone, timber, corn, grain, malt, meal, flour, and other goods, wares, merchandize, and commodities, except all dung, soil, marl, ashes, and other manure (other than lime, which shall pay half the said tolls), and except gravel, stone, and other materials for mending the public and private roads, which shall pass toll free, which shall be navigated, carried, or conveyed upon or through the said intended canal and collateral cut, and so in proportion for any greater or less quantity than a ton."

Sect. 83 enacts, that certain proprietors of lands and their tenants, in certain parishes cut or passed through by the said canal, "shall, between the 1st day of November and the 1st day of May, yearly, be exempt from the gross tonnage of $2\frac{1}{4}d.$ thereby charged upon entering into or passing out of the canal at its junction with the river Trent, for all goods, wares, merchandize, and commodities whatever, which shall be for hire or private use, and not for sale, and navigated only between the said river Trent and a certain lane called Hollowgate-lane."

By sect. 96 it is enacted, "that no boat, barge, or other vessel shall pass through any of the locks to be made by virtue of this act, without the consent of the said Company of proprietors, &c., unless such boat, barge, or other vessel,

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shall pay a duty or rate equal to what would be paid by a vessel loaded with a burthen of thirty tons, unless waste water shall be running over the regulating weirs of such locks, or unless such vessels shall be returning, after having passed on the said canal with a greater burthen than thirty tons."

And by sect. 129 it is enacted, "that it shall be lawful for the owners and occupiers of any lands adjoining to the said canal, to use upon the said canal any pleasure boat or boats, or any other boat or boats for the purpose of husbandry, or for the carrying of cattle from one farm, or part of a farm or lands, to any other farm or lands of the same owner or occupier, without interruption from the said Company of proprietors or their agent, and without paying any duty for the same, so as such boat or boats shall not pass through any lock to be made on the said navigation without the consent of the said Company of proprietors, or be employed for carrying any goods, wares, or merchandize to market or for sale, or any person for hire."

For some years past the defendants have been in the habit of allowing vessels to enter the canal without payment of tolls, giving to the parties in charge of them a written permit; the tolls being demanded and taken on the return passage.

On the 24th of September, 1842, the plaintiff caused to be loaded on board of a boat, hired by him for the purpose of carrying the same from the Trent cut and from the river Trent, into and along the said canal, to a place called Harby, distant about eighteen miles, thirty-eight tons and upwards of manure and manure ashes, in order to manure land in his occupation at Langar, distant a mile and a half from the canal. On the arrival of the vessel at the lock, the plaintiff's agent was informed that toll would be demanded, whereupon he protested against payment, and was allowed to pass, receiving at the same time a permit

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for that purpose. On the 28th of February, the boat returned along the canal empty, and arrived at the lock on its passage back to the Trent. 'The defendants' collector then refused to permit the said boat to pass through the lock without payment for thirty tons tonnage; he said he made no charge for the cargo, but only for the boat; and because the plaintiff could not otherwise procure a passage for the said boat through the lock, the plaintiff paid to the defendants the said sum of 3*l.* 12*s.* 6*d.*

There was no waste water running over the regulating weir of the lock at the time of the passing or repassing of the boat.

The said sum of 3*l.* 12*s.* 6*d.* is made up of a charge of 2½*d.* per ton on thirty tons, for entering into the canal at its junction with the Trent, and 1½*d.* per ton for each mile, for navigating the canal to the place where the cargo was delivered.

The Court are to draw any conclusion of fact that seems fit to the Court, and either party is to be at liberty to turn this case into a special verdict, by leave of the Court.

If the Court shall be of opinion that the plaintiff was entitled to recover to any amount, then the verdict is to stand for such amount; but if the Court shall be of a contrary opinion, then the verdict is to be vacated, and a verdict for the defendants or a nonsuit entered, as the Court shall think fit to order.

H. Hill, for the plaintiff.—The 82nd section of this act of Parliament imposes two classes of tolls: first, a tonnage of 2½*d.* per ton on the vessels entering or passing out of the canal; and secondly, a mileage toll of 1½*d.* per ton per mile for the navigation of the canal. Then there is an exception upon both these tolls in favour of vessels laden with manure. The cargo of the boat in question, therefore, was exempted altogether from toll by the clause imposing the tolls. Then sect. 96 is relied on by the defend-

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ants as entitling them to demand a toll in respect of a cargo of thirty tons. But that section imposes no additional toll, but is to be read merely as enlarging the tolls already given. Such an act as this constitutes a bargain between the promoters and the public; and the former are bound to use plain and unambiguous words whenever they seek to impose a burthen on the latter; if the words be ambiguous, the public is to have the benefit of the doubt: *Stourbridge Canal Company v. Wheeley* (a), *Barrett v. The Stockton and Darlington Railway Company* (b). It is not necessary, however, in this case, to call in aid that principle of law, for here the 96th section will be abundantly satisfied by construing it merely as referring to the subject-matters liable to the tolls already given by section 82. But if it be taken as having been received for tonnage on the goods, there is nothing in sect. 96 to impose any toll on goods, and these goods are exempted from toll by section 82. There is no previous section imposing any toll upon the vessel; sect. 96, therefore, when it speaks of "a duty or rate equal to what would be paid by a vessel loaded with a burthen of thirty tons," must mean such a duty or rate as would be payable under sect. 82, on thirty tons of such a cargo as is thereby liable to duty. If the vessel has a *toll-paying* cargo, which is not equal to thirty tons, it must pay as if it were thirty tons. [He cited also *The Leeds and Liverpool Canal Company v. Hustler* (c).]

J. Hildyard, contra.—The exception in sect. 82 does not operate upon the first description of tolls thereby imposed, —the entrance toll of $2\frac{1}{2}d.$ per ton on the gross tonnage,—but only on the mileage tonnage. The sentence which gives the gross tonnage is complete before the exception

(a) 2 B. & Ad. 792.

(c) 1 B. & C. 424; 2 D. & R.

(b) Ante, Vol. 2, p. 443; 2 M. 556.

& G. 134; 2 Scott, N. R., 337.

comes in. And it may be observed, that the word "whatsoever," which occurs in the first branch of the clause, is not to be found in that part of it which relates to the mileage toll. The defendants are, therefore, entitled to the gross tonnage at least, unless it can be said that an *empty* boat has a right to demand a free passage. But, at all events, the words in sect. 96, "no boat, barge, or other vessel," were intended to override the previous general permission to pass along the canal. And the exception in that section, of a limited class of empty boats, such as shall be returning after having passed with a greater burthen than thirty tons, shews that no other empty boats were entitled to pass without payment. The exception, therefore, in sect. 82 is qualified by sect. 96; and, under the circumstances therein mentioned, the cargo does not privilege the boat. The privilege exists only at certain restricted and convenient times; at other times the Company have a right of stoppage, and the payment then becomes a mere matter of compact between the parties.—It is argued on the other side, that the effect of sect. 96 is only to enlarge the tolls already given; if that be so, it follows that an empty boat is entitled to pass without payment at all, because no toll is already given in respect of empty boats.

H. Hill, in reply.—The word "whatsoever," in sect. 82, applies to both classes of tolls; and so also does the exception. The words "for every ton of coal, stone," &c., in the exception, apply to both descriptions of toll, and have the same meaning as the words "per ton of coal, stone," &c. So, also, the words at the end, "and so in proportion for any greater or less quantity than a ton," must apply to both classes of tolls.

POLLOCK, C. B.—As there has been some doubt entertained in the course of the discussion, I am extremely glad that there is an opportunity of taking our judgment to

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another tribunal; and I for one, whatever opinion I may have upon the subject, shall concur in giving leave to do so, by turning the case into a special verdict. Upon one part of the case, I entertain no doubt whatever; and that is, that the Company have not a right to charge the *mileage* in this case: that, I think, is perfectly free from doubt. I do not see how it can with any colour be argued that the manure was liable to the mileage duty: and I will take the case upon the broadest grounds. I shall put the question exactly thus:—A boat with more than thirty tons of manure presents itself, and demands admission on the canal, for the purpose of navigating and being carried on or through the canal. Then I consider the proprietors of the canal to have demanded, first $2\frac{1}{2}d.$, the gross toll for entering the canal, and then the $1\frac{1}{2}d.$ for the mileage. It is upon that computation that the duty of $3l. 12s. 6d.$ has been paid. I consider that to have been demanded in the first instance, though not paid until afterwards. Now, here the exception is of *manure*—“all dung, soil, marl, ashes, and other manure,” are matters to which the operation of the clause, as it appears to me, as far as the *mileage* is concerned, clearly could not apply. The only difficulty is, as the exception occurs in that portion of the section which particularly mentions the mileage duty, whether the exception applies also to the gross toll or duty on the entrance into the canal; and upon the best consideration I can give the subject, it appears to me, and certainly has appeared to me all along, that manure is exempted from both duties. I think we must give the same construction to the clause with reference to manure in general, that we give with reference to lime; and if this were a case of lime and not of manure,—if the question arose whether lime was to pay the whole of the entrance duty and half of the mileage duty, or was to be exempt from one-half of both, I am of opinion that our judgment ought to be that lime was exempt from one-half of both duties. The expression is, “except all dung, soil, marl, ashes, and other

manure *other than lime*, which shall pay half *the said tolls*." If this was not intended to comprehend both tolls, I think there ought to have been some expression similar to that which occurs further on in the act, in sect. 89, where it says: "No more than one-half of the rates and duties *last before mentioned* shall be paid for lime conveyed upon any part of the said river Trent last before mentioned;" it ought to have been pointed out that lime was to be exempted from the mileage toll, but should not be excepted from the gross or entrance toll; but as the expression is "other than lime, which shall pay half the said tolls," I infer that lime was to pay no more than half, both of one and of the other. So I think it is quite clear that the mileage duty upon dung, soil, marl, ashes, and other manure, is not to be paid, and then upon lime there is to be half the tolls paid, and the materials for repairing the public and private roads are to pay nothing for toll, either in the one case or the other; and I observe these words are added, "which shall pass toll free." Now, perhaps, very much ought not to turn upon criticism so purely verbal as this; but it is to be remarked, that the expression imposing the duty in the first instance is, "on entering into or passing out," that is, the gross toll; the mileage toll is for goods "which shall be navigated, carried, or conveyed upon or through the said intended canal;" but manure and materials for mending public or private roads "are to pass toll free." I think, therefore, it cannot be considered that manure and materials for roads should be liable to any duty whatever; and when this cargo presented itself at the entrance of the canal, for the purpose of being admitted to be navigated upon it, it appears to me that the Company had no right to demand anything, but that they were bound to admit it free under the 95th section, which provides that "all persons whomsoever shall have free liberty to use with horses, cattle, and carriages, the private roads and ways, (except the towing-paths), for the purpose of conveying coal, stone, timber,

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corn, grain, malt, meal, flour, and other goods, wares, merchandize, and commodities whatsoever, to and from the said intended canal and collateral cut, and to navigate upon the said canal and collateral cut, or the trenches, sluices, or passages, with any boats, barges, or other vessels, provided they navigate the same between the hours of six of the clock in the morning and six in the evening, or within such other limited times as the said Company of proprietors may by any bye-law direct or appoint." It seems to me that those who were entitled to enter and navigate without paying toll, were upon the same footing exactly as those who were entitled *on* paying toll, and paid toll. With respect to the 96th section, I have no doubt its object was merely to prevent vessels passing through with cargoes or loading of less than thirty tons. If they choose to go through with less than thirty tons, then they must pay as on a cargo of thirty tons; but either under what may be called the equity, or looking at the fair construction of this clause, I think a boat laden with *manure*, of less than thirty tons burthen, had a right to go free, and that the proprietors had no right to say, "We will not let you in, because you cannot put yourself in the same situation which a boat laden with a different cargo might do." A boat laden with fifteen tons of stones might be let in, upon the party saying he would pay for thirty: but in the case of manure, they cannot place the party in that situation.

Upon these grounds, I think the verdict should be entered for the plaintiff for the entire sum claimed.

ALDERSON, B.—I am of the same opinion. The case, in substance, appears to be this:—A boat of more than thirty tons burthen, with a cargo of manure, presents itself at the canal for the purpose of navigating it, and of passing the lock. There is no permit to pass at certain times, unless on payment of the utmost tolls which a boat of that kind is bound to pay, either on entering or navigating the

canal. Having discharged her cargo, she is returning back, and on her way back she is stopped, and then the defendants refuse to permit her to pass, until payment of such sum as they are entitled to receive, which they choose to call the sum of 3*l.* 12*s.* 6*d.*, being a gross toll of 2½*d.* per ton, and 1½*d.* per ton per mile. The party pays the whole of that sum to free his vessel from the embarrassment in which she is placed in the canal; and having been so compelled to pay it, is entitled to recover back such sum as he has been compelled to overpay by reason of the agreement which was made upon originally entering into the canal. That, in substance, raises the question, whether the defendants are entitled to one or both, or neither, of the tolls in question. That question turns upon the construction of the 82nd section; and by that section, as it appears to me, neither of the tolls is payable by the plaintiff. I read the section thus:—that the Company are entitled to charge for all merchandize, goods, and commodities whatsoever, which shall be navigated, carried, or conveyed through the canal, two rates or duties, which they the Company are to take, not exceeding the sums mentioned in the act. What are those two rates? First, a sum of 2½*d.* for every ton;—it does not say expressly for what, but it must mean for every ton of goods thereafter mentioned,—“on entering into or passing out of the said intended canal, at its junction with the river Trent; and also not exceeding the sum of 1½*d.* a mile for every ton:” and then having gone through the statement how much the rates are per ton, it states what the goods are on which these tolls respectively are to be paid, and they are these—the Company are “to ask, demand, take, and recover to and for their own use and behalf, for tonnage upon all coals, stones, timber, corn, grain, malt, meal, flour, and other goods, wares, merchandize, and commodities whatsoever,” not exceeding the sums I have mentioned:

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but then there is excepted therefrom, and out of the payment of *both* the tolls, "all dung, soil, marl, ashes, and other manure;" and then there is a partial exemption for lime, which is to pay half the said tolls. It seems to me that the clear words of the act of Parliament amount to this:—the whole dues are to be paid upon all wares, merchandize, and commodities, excepting dung, soil, marl, ashes, and other manure, and excepting also "gravel, stone, and other materials for mending the public and private roads, which shall pass toll free; and also excepting lime, which has only a partial exemption, namely, as to half. It seems to me that is the true and plain construction of the 82nd clause, and that the defendants, therefore, were not entitled to charge in respect of manure anything at all. All persons are to be entitled to navigate the canal on payment of such dues as they are bound under the act to pay; but boats going with manure are entitled to be let out, not paying anything at all.

GURNEY, B.—I am of the same opinion. It is very clear, as it appears to me, that the exemption is intended to apply both to the gross toll and to the mileage toll. That is the plain meaning of the words, and the phrase used is the strongest one possible, which is, that "they shall pass toll free." That being the case, I think the 96th section merely intended to enlarge the tolls mentioned in the 82nd section, which are to be demandable to the extent of thirty tons at the least, upon a vessel carrying a toll-paying cargo of less than thirty tons.

ROLFE, B.—I am of the same opinion. The section which imposes the toll is the 82nd; and by that section two tolls are imposed, one a gross toll, payable once for all, the other a mileage toll. After enumerating what shall pay the mileage toll, all vessels carrying dung or manure are ex-

cepted therefrom. That there is no doubt upon ; the only question is, whether or not those vessels are also excepted from the gross toll. Now the most that can be said in favour of the parties claiming the gross toll is this, that there is to a certain degree ambiguity and doubt ; reading certain words under a vinculum, there is no difficulty ; reading them without that, there is. I think that the Company cannot, under such circumstances, interpret the clause favourably for themselves ; and if we are driven to speculate about it, my opinion is, that the legislature distinctly meant to exempt such vessels from both tolls : and for this reason, that the clear object of the exception was to encourage the improvement of the land, by giving facilities for the carriage of manure. If that be so, I cannot conceive why they should give those facilities to persons living some way up the canal alone, and not to persons living at the entrance ; and no exemption would be given to the latter, if the gross toll were paid for manure that was carried to the land immediately adjoining the entrance. If the exemption was only to be from the mileage toll, it would not operate equally ; for it is clear that the places immediately adjoining the locks of the canal would not have to pay any toll at all, whereas those farther off would have to pay the toll upon the entrance. It is absurd to suppose that a less proportion of exemption was intended to be given to the lands lying at a greater distance, beyond the entrance of the canal, than to those which lay near its locks. But this is speculating upon the meaning of the legislature, which we are not bound to do ; it is quite sufficient to say, that the toll is not imposed in clear terms, and therefore that the Court cannot give effect to the words in favour of the defendants, and against the public. With regard to the 96th section, it only means this—although you are bound to pay the rate of duty according to your tonnage, the proprietors shall not be compelled to open their lock and pass you through, unless you have a load of thirty tons, or a payment be made

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equivalent in value to that. That is all, as it appears to me, that is intended by that section.

Judgment for the plaintiff.

IN THE EXCHEQUER CHAMBER.

(*Error from the Court of Exchequer*).

In Michaelmas Vacation, 1845.

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The Company of Proprietors of the GRANTHAM CANAL
 NAVIGATION v. HALL.

THE above case having been turned into a special verdict, pursuant to the leave reserved in the Court below, a writ of error was afterwards brought, and was now argued before *Tindal, C. J., Coleridge, Coltman, Maule, Wightman, and Cresswell, Js., by Hill*, for the plaintiffs in error.

H. Hill, contra, was stopped by the Court.

TINDAL, C. J.—The Court are unanimously of opinion, that the judgment ought to be affirmed. The question, in substance, turns upon the 82nd section of the Company's act, giving a toll on commodities carried along the canal. The first words of that section are, "that it shall be lawful for the said Company of proprietors to take for their own use and behoof, for tonnage upon all coals, stones, timber, corn, grain, malt, meal, flour, and other goods, wares, merchandize, and commodities whatsoever, which shall be navigated, carried, or conveyed upon or through the said intended canal and collateral cut, such rates and duties as the said

Company of proprietors shall think fit, not exceeding the sum of $2\frac{1}{4}d.$ for every ton on entering into or passing out of the said intended canal at its junction with the river Trent, and also not exceeding the sum of $1\frac{1}{4}d.$ a mile for every ton of coal, stone, timber, corn, grain, malt, meal, flour, and other goods, wares, merchandize, and commodities." Supposing these words had stood alone, there could have been no doubt that there would be a duty payable in this particular instance, both on entering the canal and also a mileage toll. But then follows the exception; and we must see whether that does not exclude the above supposition. The exception is, "except all dung, soil, marl, ashes, and other manure, (other than lime, which shall pay half the said tolls), and except gravel, stone, and other materials for mending the roads," which are, by that section, admitted to pass toll free, that is, free from both the gross toll and the mileage toll. It seems, therefore, that, under the 82nd section, manure is to pass toll free; probably it was thought that the benefit which would accrue to agriculture by this provision was a sufficient reason for its enactment. Then comes sect. 96, upon which the Company found their argument in favour of this claim. They say, the effect of that section is, that no boat or barge whatever, with a lading of less than thirty tons, shall pass through the entrance lock, except on payment of a tonnage duty equal to what would be paid by a vessel laden with thirty tons, unless waste water is running over the weir. It seems to us, however, that the proper construction of the section is, that it applies to vessels laden with a cargo of less than thirty tons, such as would pay toll, and that the effect of that section is merely to enlarge the tolls given by the 82nd section. For example, suppose a boat laden with a ton of butter and cheese, or other toll-paying commodities, then it must pay a toll equivalent to a burden of thirty tons, in order to pass the lock; but if it contains manure or other exempted cargo, it is entitled to pass toll free, whatever be its tonnage. For

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these reasons, we are of opinion, that the judgment of the Court below ought to be affirmed.

Judgment affirmed (a).

(a) The following case, decided in the Court of Exchequer in Michaelmas Term, 1844, bearing upon the preceding, is here subjoined :—

COULTON v. AMBLER.

Under a canal act, 35 Geo. 3, c. lxxvii, s. 35, imposing a toll "on coals, lime, timber, bricks, stone, and all other goods, wares, or merchandize whatsoever, gravel and materials for the repair of turnpike roads are liable to toll.

THIS was an action of trespass, for seizing gravel belonging to the trustees of certain turnpike roads in the county of Norfolk, under an act 4 Geo. 4, c. lv. The gravel was seized by the defendant under the authority of the Commissioners appointed under the Eau Brink Cut, 35 Geo. 3, c. lxxvii, for toll alleged to be due, under sect. 35 of that act, for its transit in a boat along the Eau Brink Cut, on its way to be used for the repair of the roads.

The 35th section enacts, "that there shall be paid on demand, during the term of ten years, commencing from the day on which the new river or cut between Eau Brink and King's Lynn shall be open, 4d. for certain quantities of coals, lime, timber, bricks, stone, &c., and for every ton weight of *all other goods, wares, or merchandize whatsoever.*"

The only question for the opinion of the Court, material to the purpose of these reports, was, whether, under those words, gravel and materials for the repair of the roads are liable to toll. The case was argued (Nov. 18th) by

Willes, for the plaintiff, and *Cowling*, for the defendant; when the Court held, that toll was payable upon such materials.

Other questions were raised in the case, which is fully reported in 14 M. & W. 403.

Judgment for the defendant.

IN THE HOUSE OF LORDS.

1846.
 Sept. 4th.

THE STOCKTON AND DARLINGTON RAILWAY COMPANY v. BARRETT.

A WRIT of error, brought upon the judgment of the Court of Exchequer Chamber, affirming the judgment of

the Court of Common Pleas in this case (*a*), was argued, March 26th, by *Kelly* and *Smythe*, for the plaintiffs in error, the defendants below; and by Sir *T. Wilde*, (*Faber* and *Fitzherbert* with him), *contrà*, when the judgment of the Court below was affirmed with costs (*b*).

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(*a*) Ante, Vol. 2, pp. 443, 466. (*b*) Reported 11 Cl. & Fin. 590.

TAYLOR v. CLEMON.

A WRIT of error was brought in this case upon the judgment of the Court of Exchequer Chamber (*c*), and was argued, May 2nd, 3rd, and 31st, by *Kelly* and *Ellis*, for the plaintiff in error, and *Erle* and *Tomlinson*, *contrà*; when the judgment of that Court was affirmed with costs (*d*).

(*c*) Ante, p. 65.

(*d*) Reported 11 Cl. & Fin. 610.

COURT OF QUEEN'S BENCH.

In Hilary Term, 1845.

The QUEEN v. The LANCASTER AND PRESTON JUNCTION
RAILWAY COMPANY.

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Jan. 16th.

IN Michaelmas Term, 1844, *Atherton* obtained a rule nisi, calling upon the defendants to shew cause why a writ of certiorari should not issue to remove into this Court an inquisition taken on the 2nd July, 1844, for the purpose of inquiring of, assessing, and giving a verdict for the sum of

By a railway act, 7 Will. 4, c. xxii, s. 63, it is provided, that, where agreement for compensation for damages incurred in the execution of

the act cannot be made, the Company shall issue their warrant to the sheriff to impanel a jury, who shall, upon their oaths, inquire of, assess, and give a verdict for the sum to be paid for compensation for the damages sustained. Sect. 206 takes away the certiorari in proceedings taken in pursuance of the act. The Company issued a warrant to the sheriff to impanel a jury to assess the sum of money, *if any*, to be paid to the claimant by way of compensation. The jury returned that he had sustained no damage:—*Held*, that, though the words “*if any*” ought to have been omitted, the warrant gave jurisdiction, and therefore that, the inquisition being a proceeding in pursuance of the act, the certiorari was taken away.

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money to be paid to James Cottam, by way of satisfaction for the damages, *if any*, done or sustained by reason of the execution of any of the works authorised by an act, 7 Will. 4, c. xxii(a), for making the said railway from Lancaster to Preston, with all proceedings had thereon.

Four objections were taken to the inquisition:—1. That it did not appear that twenty-four persons had been summoned by the sheriff. 2. Nor that twelve out of such twenty-four had been drawn for a jury. 3. That the judgment was signed by, and purported to be that of the sheriff; whereas it ought to have been by the under-sheriff, who appeared, on the face of the proceedings, to have presided at the inquisition. 4. That the jury, who had found by the verdict that James Cottam had not sustained any damage, by reason of the matters in the warrant mentioned, had no right to give such a verdict of no damage, and, therefore, that the verdict was a nullity.

Baines now shewed cause, and took a preliminary objection that the certiorari was taken away by sect. 206; and,

(a) Sect. 63 enacts, “that, where agreement for compensation for damages incurred in the execution of the act cannot be made, the Company shall issue a warrant under their common seal to the sheriff, under-sheriff, or coroner, commanding such sheriff &c. to impanel, summon, and return a jury of at least twenty-four sufficient men; and the persons so impanelled, &c. are required to appear, &c.; and out of such persons so to be impanelled &c., a jury of twelve men shall be drawn by the said sheriff, &c., and such jury shall, upon their oaths, inquire of, assess, and give

a verdict for the sum of money to be paid by way of satisfaction or compensation either for the damages which shall before that time have been done or sustained, or for the future damages, &c.; and the said sheriff, &c. shall accordingly give judgment for such satisfaction or compensation as shall be assessed by such jury.”

Sect. 206 enacts “that no proceedings had or taken in pursuance of this act shall be quashed or vacated for want of form, or be removed by certiorari or by any other writ or proceeding whatsoever, into any of his Majesty’s Courts of record at Westminster.”

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therefore, that, as the proceedings had originated properly, the jurisdiction at once attached, and no further inquiry could take place. He cited *Rex v. Casson* (a), *Rex v. The Justices of the West Riding of Yorkshire* (b), *Regina v. The Sheffield, Ashton-under-Lyne, and Manchester Railway Company* (c), and *Regina v. The Bristol and Exeter Railway Company* (d). The Court then called on

Atherton, contra.—This inquisition, though it professes to be a proceeding under the act, is not in fact so, as the warrant exceeds the power authorised by the act. It is a warrant by the Company, which, instead of following the words of the act, requires the sheriff to impanel a jury for the purpose of assessing the damages, *if any*, which are to be paid. It therefore exceeds, though it comprises jurisdiction. [Lord DENMAN, C. J.—If the words “if any” had been omitted, might not the jury have found no damage, as they have done?] Then the warrant would have been in conformity with the act, and would have given jurisdiction, in which case it is admitted the certiorari would have been taken away. Here they have obeyed the warrant; but that is an improper one, so that jurisdiction never attached. If no damage has been sustained, the Company should refuse to issue their warrant, as in *Walker v. The London and Blackwall Railway Company* (e); but, by consenting to the inquiry, they admit that some damage has been done.

LORD DENMAN, C. J.—The terms of the 63rd section of this act raised, at one time, some small degree of doubt in my mind; and, I think, the Company would have

(a) 3 D. & R. 36.

(d) Ante, Vol. 2, p. 99; 11

(b) 1 A. & E. 563.

A. & E. 202.

(c) Ante, Vol. 1, p. 537; 11 A. & E. 194.

(e) Ante, p. 396; 3 Q. B. R. 744.

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done better if they had issued their warrant to the sheriff to inquire into the damages sustained by the claimant, without raising any doubt, by adding the words "if any," but I think those words make no difference. It is true, the warrant is to be issued in any case where agreement for compensation for damages incurred in the execution of the act cannot be made, assuming apparently that some damage has been done; and the verdict is to be given for the sum of money to be paid by way of satisfaction or compensation for the damage done. But then the section says, that the jury shall, upon their oaths, inquire of and assess the sum to be paid; and even if Mr. *Atherton* be right in saying that the Company have assumed, by issuing their warrant, that some injury has been done, that opinion of the Company would not bind the jury, a necessary part of whose duty it is to ascertain for themselves what damage the claimant has in fact sustained. It is impossible for us to say, that the jury might not be bound to come to the conclusion, that the claim was altogether unfounded, and that no damage whatever had been sustained. They are not bound to find damages, if none are in fact due. If the warrant and the proceedings be void for the defect alleged, that defect appears on the face of the proceedings; and there can be no need of a certiorari to quash that by which the claimant is not injured. If the warrant be not void, the inquisition is a proceeding under the act, and the certiorari is taken away.

PATTESON, J., concurred.

COLERIDGE, J.—The only question here is, as to the form of the warrant. Now, no form of warrant is given in the act; and though I agree that it would have been better if the words "*if any*" had been omitted, I cannot say that the warrant is void because those words are

inserted. As to the conduct of the jury, it is said, that the issuing of the warrant must admit something to be due, and that they are bound to inquire into and assess the damages; but, on that inquiry, the quantum of damages may be reduced to nothing; the claimant may have been greatly benefited, or not at all injured by what has been done under the act; if so, they must so find it. It is impossible to prevent a jury from returning such a verdict as they have done. They are under the obligation of their oaths, and may be bound thereby to return a verdict that the claimant has sustained no damage; otherwise, finding a farthing to be due would be just as much a breach of their oath as if they had returned a verdict for £1000.

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 JUNCTION
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WIGHTMAN, J., concurred.

Rule discharged (a).

(a) See *Regina v. The Hull Dock Company*, post, p. 795.

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IN THE EXCHEQUER CHAMBER.

*(Error from the Queen's Bench).**In Hilary Vacation, 1845.*

Feb. 1st. CLARKE v. THE LEICESTERSHIRE AND NORTHAMPTONSHIRE
UNION CANAL COMPANY.

By a canal act, (33 Geo. 3, c. xcvi), the defendants were empowered to make a canal, to be called the

Union Canal, from L. to N., with a cut from G. (a point in the line) to M. It being found impracticable to carry the work to N., another act was passed (45 Geo. 3, c. lxxi), enabling them to vary the line of the cut from G. to M., which was done accordingly. A third act was afterwards passed (50 Geo. 3, c. cxxii), for joining the Union Canal to the Grand Junction Canal, by means of a canal from G., to be called the Grand Union Canal; which was also done.

By the act 33 Geo. 3, the defendants were authorized to receive for coal, navigated upon the Union Canal and cut, a mileage tonnage of 2½d., so as not to exceed a certain sum (5s.). By the 50 Geo. 3, it was enacted, that they should not be entitled to receive more than 2s. 6d. per ton for coal navigated on the Union Canal, and thence on the Grand Union Canal for a certain specified distance (to H.); and 2s. 1d. if carried beyond that distance.

A *mandamus* issued, reciting that M. was aggrieved by the tonnage taken by the defendants on coal being higher from L. to M. by G., than if it were carried, after passing G., upon the Grand Union Canal; and commanding the defendants to establish a uniform rate of tolls along the whole of their line, or to take tonnage on coal from L. to M. only in proportion to that carried from L. to G. and afterwards upon the Grand Union Canal, so long as they took less than the 2s. 6d. and 2s. 1d. on coal carried from L. to G. and afterwards upon the Grand Union Canal. The return to the *mandamus* denied the demand and receipt of unequal tolls. A traverse to the return re-asserted these particulars.

Held, (on demurrer to the traverse), that the first act having authorised a *mileage* toll, and the last act prohibiting in certain cases more than a certain amount of *gross* toll, the power of making a uniform rate of toll was expressly taken away from the defendants.

And that the first act having imposed such *mileage* toll on coal on the whole line of the Union Canal and cut, and having only exempted it from such toll if it passed along the Grand Union Canal, the original toll still prevailed from L. to M. on the Union Canal.

The validity of a *mandamus* may be impeached on demurrer to a traverse of the return to it.

(a) See *Regina v. The Leicestershire and Northamptonshire Union Canal Company*, ante, p. 1,

where the sections of the acts, and arguments of counsel, are fully stated.

dal, C. J., Lord Abinger, C. B., *Erskine* and *Cresswell*, Js., and *Parke*, *Alderson*, and *Rolfe*, Bs.

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Peacock, for the plaintiff in error, in addition to the arguments urged below, contended, that, at this stage of the proceedings, it was not open to the defendants to attack the validity of the writ of mandamus for any insufficiency in it; citing *Green v. Pope* (a).

Manning, Serjt., contra, cited *Rex v. The Margate Pier Company* (b).

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the Court.—This was a writ of error upon a judgment given by the Court of Queen's Bench in favour of the defendants. The prosecutor had sued out a mandamus directed to the Company, commanding them to make and establish an uniform rate of tolls to be taken along the whole line of the canal described in the mandamus, or that they should demand and take only a certain amount of rates therein also specified. To this mandamus the defendants have made their return, and the prosecutor has traversed several of the facts in such return; and upon a demurrer to the traverse, the Court of Queen's Bench has given judgment for the defendants, upon the ground that the matter discussed in the writ itself was insufficient to support such writ. Upon the argument before us, it was objected on the part of the plaintiff in error, that, at this stage of the proceedings, it was not open to the defendants to fall back upon the writ of mandamus, and to rely upon any insufficiency of the writ itself; and the case of *Green v. Pope* (a) was relied upon as an authority for that point. The case cited, however, differs entirely from that which is before us. It was that of an action brought in the

(a) 1 Ld. Raym. 125.

(b) 3 B. & A. 220.

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Court of Common Pleas for a false return to a mandamus, issued out of the Queen's Bench; and all that was observed by the Court upon that objection being made was, that the question, whether the mandamus would lie or not, was not then before the Court; but that it must be taken pro confesso that a mandamus had been granted, and the defendant made a false return. And in that case the plaintiff would have been entitled to damages only, not to a peremptory mandamus, as he would have been if the action had been brought in Banco Regis; in which Court, however, if the first mandamus was defective, no peremptory mandamus would have gone; but here we are called upon to say whether the Court of Queen's Bench had authority to grant the mandamus which is set out upon the record itself; and the case of *Rex v. The Margate Pier Company* (a), we think a decisive authority that such question may be raised in any stage of the proceedings. And upon the question whether the mandamus does, or does not, upon the face of it, disclose the legal grounds of complaint, as we agree in the conclusion at which that Court has arrived, it will be unnecessary to do more than to state shortly the view we take of the mandatory part of the writ, when compared with the provisions of the statutes upon which it professes to be founded.

The writ calls upon the proprietors of the canal to do one of two things, namely, either to make an uniform rate of tolls to be taken along the whole line of the canal, or to demand and take rates for the tonnage of all coals and coke which may be carried or conveyed upon the navigation and collateral cut from Leicester to Market Harbrough, only equal in proportion to the rate which the Company demand and take for the tonnage of coals and coke which may be carried and conveyed from Leicester to Gumley upon the said navigation, (within certain limits of toll mentioned in the writ). But as to the first part of this pro-

(a) 3 B. & A. 220.

posed alternative, we are of opinion, referring to the provisions of the stats. 33 Geo. 3, c. xcvi, and 51 Geo. 3, c. cxxii, that the Company are not bound to comply with the exigency of the writ when so framed; for, by the 67th section of the former act, under which the canal from Leicester, and the cut to Market Harborough, were originally empowered to be made, the Company are authorised to take a mileage-toll of $2\frac{1}{2}d.$ per ton per mile on all coal and coke to be navigated and conveyed upon the said navigation, canal, or collateral cut; and no authority is given to take any other than a mileage toll. It is unnecessary to refer to the stat. 45 Geo. 3, recited in the writ, any further than to observe, that, although it varies the line of the navigation, it makes no alteration in the tolls to be taken thereon. But it is upon the 51 Geo. 3, c. cxxii, that the prosecutor relies, as an authority to call upon the Company to make an uniform rate of toll along the whole line of canal. The act itself, however, appears to us to bear no such construction. The mileage duty given by the first act, from Leicester to Gumley, is nowhere repealed by it—on the contrary, the power of receiving such mileage toll is recited in the 70th section of this act, which is stated to amount to $3s. 9d.$ per ton, from Leicester to Gumley; and the statute, after reciting further, that the Company of proprietors of the Leicestershire and Northamptonshire Union Canal had agreed to reduce that toll from $3s. 9d.$ per ton to $2s. 6d.$, on coals and coke passing from that canal into the Grand Union Canal, and carried along the same any distance not exceeding eighteen miles, and $2s. 1d.$ per ton on coals and coke passing from the said canal into the Grand Union Canal, and carried along the same more than eighteen miles, by that section enacts, that, in the respective cases mentioned, the Leicestershire and Northamptonshire Union Canal Company shall not take more than those sums. Had it been intended that a corresponding reduction should be made in other cases, it would no doubt have been provided for; and, in the absence of any

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such provision, it appears to us, that, notwithstanding the restriction put upon the rights of the Company in the two cases specified, these rights in all others remain unaltered. Moreover, this very clause sanctions the taking of two different amounts for coals, &c. carried the same distance along the Union Canal, namely, from North End to Gumley, and is altogether inconsistent with the idea that the legislature intended to impose on the Company the necessity of making an equal mileage toll in every case. If the Union Canal Company had continued to exact the maximum in each of the two cases provided for by the section above referred to, they would still have been taking less than the mileage toll originally granted and exacted in other cases; but it would have been impossible to maintain that they were bound to make a corresponding reduction in all cases. If bound to reduce the toll in all cases, must the reduction have been from 3*s.* 9*d.* to 2*s.* 6*d.*, or from 3*s.* 9*d.* to 2*s.* 1*d.*? The granting of these two different sums in respect of the same distance, renders the principle of an equal mileage duty inapplicable to the cases specified, and a reduction in those cases could not make a reduction necessary in others; and as each of those sums is mentioned as a maximum, and not a fixed amount to be always levied, the Company had power to reduce them, and the principle of a mileage duty was no more applicable after such reduction than before.

As to the second branch of the mandatory part of the writ, it appears to us, as it did to the Court below, to be virtually and substantially the same as the first branch, and therefore, that it must receive the same answer as the first.

We therefore think, that, by reason of the insufficiency of the writ, judgment should be given for the defendants in error.

Judgment affirmed.

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COURT OF EXCHEQUER.

In Easter Term, 1845.

The CALDER and HEBBLE NAVIGATION COMPANY v. PIL- *April 23rd.*
LING and Others.

TRESPASS for breaking and entering a close of the plaintiffs, being part of a certain canal called The Calder and Hebble Navigation, in the county of York, and then forcing and breaking a chain of the plaintiffs, then fastened across the said canal.

Plea, that, before and at the said time when &c., the said close was part of a public or common canal or navigation, that is to say, The Calder and Hebble Navigation, navigable for boats, barges, lighters, and other vessels, under certain acts of Parliament, to wit, the 9 Geo. 3, c. lxxi, and others, [setting out the titles]; and because the said chain, at the said time when &c., had been and was unlawfully and wrongfully placed, suspended, and fastened across the said canal, and obstructing the same, and the navigation thereof, at the said close in which &c., so that, without removing the said obstruction, the liege subjects of our lady the Queen then could not navigate or pass upon and along the canal at the said close, &c., with their barges, &c., carrying therein goods, &c., as under and by virtue of the

By a local act, 9 Geo. 3, c. lxxi, s. 37, the Company were empowered to make bye-laws for the good government of the Company, and for the good and orderly using the navigation, and also for the well governing of the barge-men, watermen, and boatmen, who should carry any goods, wares, or merchandise upon any part of the said navigation, and to impose and inflict such reasonable fines or forfeitures upon all persons offending against the same, as to the

major part of the Company should seem meet, not exceeding £5 :—*Held*, that this power did not authorise the Company to make a bye-law that the navigation should be closed on every Sunday throughout the year, and that no business should be transacted thereon during such time, (works of necessity only excepted), nor should any person during such time navigate any boat, &c., nor should any boat, &c. pass along any part of the said navigation on any Sunday, except for a reasonable distance for the purpose of mooring the same, and except on some extraordinary necessity, or for the purpose of going to, or returning from any place of divine worship, under a penalty of £5; and that such bye-law was illegal and void.

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said statutes they otherwise ought to have done, and would have done; and because one John Wood, then being a liege subject of our lady the Queen, having, at the said time when &c., occasion to navigate on the said canal, at the said close, &c., with certain boats and other vessels of him the said John Wood, fit and proper &c., and not exceeding &c., for the purpose of carrying therein divers goods, wares, and merchandise, then loaded and being in and upon the said boats, &c., and being then so obstructed as aforesaid, therefore the defendants, as servants of the said John Wood, and by his command, at the said time when &c., in order to remove the said obstruction, and that the said John Wood might be able to navigate on the said canal, &c., entered on the said close, and struck, forced, and broke the said chain, then being suspended and fastened, and obstructing as aforesaid, as they lawfully might for the cause aforesaid &c.

Replication, that, after the passing of the said several statutes, and after the executing and completing of the several works thereby respectively authorised, and before the said time when &c., to wit, &c., at a general meeting of the Company of proprietors of the said Calder and Hebble Navigation, held at &c., pursuant to the statute in such case made and provided, the said Company of proprietors, in pursuance and by virtue of the powers and authorities to them given and granted by the said several statutes, &c., did make, constitute, and publish the following rule, bye-law, and constitution, in writing, under the common seal of the said Company, for the good government of the said Company, and for the good and orderly using the said navigation, and all such warehouses, wharfs, passages, locks, and other things that were or should be made for the same, and of and concerning all such vessels, goods, and commodities as should be navigated and conveyed thereon, and also for the well governing of the barge-men, watermen, and boatmen who should carry any goods,

wares, or merchandise upon any part of the said navigation, (that is to say), ‘‘ We, the Company of proprietors of the Calder and Hebble Navigation, in pursuance and by virtue of the powers and authorities to us given and granted in and by the several statutes in such case made and provided, some or one of them, do hereby make and constitute the following rule, bye-law, and constitution, for the good governing of the said Company, and for the good and orderly using the said navigation, and all warehouses, wharfs, and passages, locks, and other things that are or shall be made for the same, and of and concerning all such vessels, goods, and merchandise as shall be navigating and conveyed thereon, and also for the well governing of the bargemen, watermen, and boatmen who shall carry any goods, wares, or merchandise, upon any part of the said navigation, (that is to say), that the said navigation, and all such warehouses, &c., be closed on every Sunday throughout the year, that is to say, from twelve o'clock each Saturday night until twelve o'clock each Sunday night, and that no business shall be transacted thereon or thereat during such time, (works of necessity only excepted); nor shall any person during such time navigate any boat, barge, or other vessel, whether empty or laden with any goods, wares, or merchandise, nor shall any such boat, barge, or other vessel be allowed to pass along any part of the said navigation on any Sunday, on any pretence whatever, after twelve o'clock on each Saturday night, except for such distance, not exceeding 500 yards, as may be reasonable and necessary for the safe mooring of such boat, &c., and except it be on some extraordinary necessity, or for the purpose of going to or returning from any place of divine worship; and if any bargeman, waterman, boatman, or other person having the charge of any boat, barge, or other vessel navigating on any part of the said navigation, or any person employed on the said navigation, or at any of the warehouses, wharfs, passages, locks, and other things that are or shall be made for the same, belonging to the said Com-

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pany, shall offend in any of the premises, he, she, or they shall forfeit and pay for every such offence the sum of £5, to be recovered and employed as directed by the said acts." Of which said bye-law and constitution the said John Wood and the defendants afterwards, and before the said time when &c., to wit, on the same day and year &c., had notice. The replication then went on to aver, that, after the making of the bye-law, the Company, in pursuance thereof, and before the said time when &c., suspended and fastened the said chain across the cut in question, for the purpose of enforcing obedience to the bye-law, &c., and for the good and orderly using the navigation, but so as to afford the free use of the navigation on due compliance with the rules and regulations thereof, such suspension and fastening of the said chain, &c., being reasonable and necessary for that purpose; and that the said chain &c. remained and was so fastened and suspended &c., until the defendants, well knowing the premises, at the said time when &c., being on a Sunday, to wit, &c., of their own wrong, entered on the said close in which &c., and struck, forced, and broke the said chain, in manner and form as in the declaration mentioned, for the purpose of enabling the said John Wood to navigate upon and pass along the said canal, at the said place &c., with his said boats &c., at the said time &c., and for a distance exceeding 500 yards, and for purposes other than for going to or returning from any place of divine worship, and not on any business of necessity, nor for any work of necessity, and there being no extraordinary necessity for navigating upon or passing along the said canal with the said boats &c. on that occasion, in violation of and against the said bye-law and constitution, &c.

Demurrer, assigning for causes, amongst others, that the said replication does not shew with sufficient certainty, how the bye-law mentioned could be for the good government of the said Company, and for the good or orderly using the said navigation, and the warehouses, &c., and for the well governing of the bargemen, watermen, &c., or how

the said Company were authorised, by reason of the said statute or otherwise, to make the said bye-law.

The defendants' points were, that the replication did not shew, with sufficient certainty, how the bye-law was made in pursuance of the alleged acts of Parliament, and that it did not disclose a valid bye-law, or such as rendered the defendants trespassers.

The plaintiffs' point was, that the bye-law was good and valid.

Cowling, in support of the demurrer.—The question in this case is, whether this bye-law, made under the power given by the 37th section of the act 9 Geo. 3, c. lxxi, (local and personal), is valid or not (a). The power of making bye-laws is an extraordinary one, and such a power ought to be construed strictly. First, this bye-law is in restraint of trade, and it is laid down as a principle that all bye-laws in restraint of trade must be reasonable and beneficial to the public, or else they cannot be supported: *The Masters &c. of Gunmakers v. Fell* (b), *Bosworth v. Herne* (c).

(a) Which enacts "that the Company of proprietors, their successors and assigns for the time being, shall have power and authority, at any general meeting to be held &c., to make such new rules, bye-laws, and constitutions for the good government of the Company, and for the good and orderly using the said navigation, and all warehouses, wharfs, passages, locks, and other things that shall be made for the same, and all such vessels, goods, and commodities, as shall be navigated and conveyed thereon, and also for the well governing of the bargemen, watermen, and boatmen who shall carry any goods,

wares, or merchandise upon any part of the said navigation, and from time to time to alter or repeal the said bye-laws and constitutions, and to impose and inflict such reasonable fines or forfeitures upon all persons offending against the same, as to the major part of the said general meeting shall seem meet, not exceeding the sum of 5*l.* for any one offence," &c.

Sect. 50 makes it a public navigation, and gives the public liberty to use the navigation, subject to the bye-laws.

(b) Willes, 389.

(c) Cas. temp. Hardw. 409.

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This bye-law was not made in pursuance of the object of the act, which was to enable the Company to make regulations for the speed of boats, the supply of water to the canal, and the delays necessary to the navigation of it, and matters of that nature, and not to give them power to stop all navigation upon it, any more than the trustees of a public highway are justified in stopping it up for a particular period. The Company justify it on the ground that it is necessary to prevent a violation of the Sabbath; but all laws for such a purpose ought to proceed from the Legislature, and it would be most dangerous to extend such a power, of making laws for preserving the sanctity of the Sabbath, to private individuals. Besides, they had no right to stop it by means of a chain; all they could have power to do would be to prohibit the use of the canal on a Sunday, and to punish every breach of that bye-law by a penalty. The act only gives them power to impose and inflict such reasonable fines or forfeitures upon all persons offending against the law, as the major part of the meeting shall deem meet. In *Adley v. Reeves (a)*, Lord *Ellenborough*, C. J., says, "A bye-law giving a remedy by distress for the recovery of the penalty would be bad. . . . It is true, undoubtedly, that if the law give the power of inflicting a penalty, where it gives the end, it also gives the common means of attaining it by action, but it does not give any extraordinary means." And *Le Blanc*, J., says, "If the usage only authorises the infliction of a penalty, and stops there, I am not aware of any case which shews that a bye-law may go farther than the common-law mode of recovering it by action." So, in Com. Dig., "Bye-law," (E. 1), it is said, "A bye-law, that a party, unless he obeys, shall be imprisoned, is void, being contrary to Magna Charta." So, in (E. 2), "A bye-law, that a party, unless he pay, shall forfeit his goods, is void." By this act, in section 44, power is given to the

(a) 2 M. & S. 53.

Company to collect tolls, but of a limited amount; but, if they are allowed to impose a penalty for travelling on a Sunday, they might thereby increase the tolls to any extent: but it was never intended they should have such a power. There is a case of a charter, where the language was very like the present, and there the bye-law was held bad, as being in restraint of trade:—*The case of the Tailors &c. of Ipswich* (a). Here it is not shewn that there was any necessity or convenience for the benefit of the canal, or the persons using it, that this bye-law should be made; and the canal has existed since the passing of the act without such a bye-law. *Dodwell v. The University of Oxford* (b) shews that, unless there is some reason for the restraint, the bye-law is bad. If persons offend by travelling on Sunday, they are punishable in the Ecclesiastical Court. [*Pollock*, C. B.—What do you say to the stat. 29 Car. 2, c. 7, s. 2, which enacts, “that no person shall use, employ, or travel upon the Lord’s day with any boat, wherry, lighter, or barge, except it be on some extraordinary occasion, upon pain of forfeiting the sum of 5s. for every such offence?”] That act has been repealed by the Thames Act, 7 & 8 Geo. 4, c. lxxv, s. 1, which, although local, is declared to be a public act. And, even if it were not repealed, it does not apply to the case of canals, or other modes of travelling unknown at the time it was passed: *Sandiman v. Breach* (c). But even if it were applicable, this bye-law does not conform to that statute. [*Rolfe*, B.—If an act be not prohibited by any public statute, can any private bye-law go further, and impose a penalty for doing it? Would not a bye-law imposing a penalty for an assault, be bad?] Yes; that is borne out by *The case of the Tailors &c. of Ipswich* (a); and *Rex v. Lord Grosvenor* (d). All restraints imposed by bye-laws, until a satisfactory reason is shewn for them, are

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(a) 11 Rep. 53, 54 a.

(b) 2 Vent. 33, 34.

(c) 7 B. & C. 96; 9 D. & R. 659.

(d) 2 Stark. N. P. C. 512.

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invalid. [He cited also *Regina v. The Governors of the Darlington Grammar School* (a).]

Addison, contra.—This is a reasonable bye-law, and in every respect pursuant to the act, being made for “the good governing of the Company, and for the good and orderly using of the navigation.” The putting the chain across has nothing to do with the bye-law itself; but it is averred in the replication, that the chain was placed there for the purpose of enforcing obedience to the bye-law, and for the good and orderly using of the navigation; and it is stated that the suspension and affixing of the chain was reasonable and necessary for that purpose; and that is admitted by the demurrer. [*Pollock*, C. B.—No; if it be a mere question of fact, then it is conceded that the fact is admitted; but if in point of law it be not justifiable, it is not admitted. *Alderson*, B.—If the bye-law be justifiable, then you had a right to put up the chain.] The sole question, therefore, is, whether the bye-law is a good and reasonable one or not. It is framed under an act which gives the Company power to make bye-laws “for the good and orderly using” of the navigation in general; and the closing it upon Sundays, except for works of necessity and the purpose of attending divine service, is a reasonable restriction, tending to the good and orderly use of the navigation in general, as much as the closing it during particular hours would be in order to render it more serviceable at other times. Sunday is a day on which, by various acts, carrying on trade is prohibited, for the purpose of preserving the sanctity of the Sabbath. Thus, in 3 & 4 Will. 4, c. 31, s. 1, it is recited, that it is the duty of the Legislature to remove as much as possible impediments to the due observance of the Lord’s Day. So, the 29 Car. 2, c. 7, s. 2, prohibiting all travelling in boats or barges on Sundays, makes no distinction whether

(a) 14 Law J., N. S., Q. B., 67.

they are used on canals or anywhere else. And that statute is still in force. It has been said, it has been repealed by the Thames Act, 7 & 8 Geo. 4, c. lxxv; but that act was passed for purposes purely local, and the general words of the 1st section are qualified by subsequent sections, which confine the repeal of it to particular limits. The 3rd section of the act says, that that act and the several provisions thereof shall extend to certain defined limits, and the provisions of the 40th and 41st sections expressly contain the words "*within the limits of this act.*" And it is a known rule of construction, that general words of repeal may be qualified by words shewing that only a partial repeal was intended: *Camden v. Anderson (a)*; *Rex v. Rogers (b)*. Then, if the 29 Car. 2, c. 7, s. 2, be not repealed, it is still penal to travel in barges on Sunday, and, if so, it would be impossible to call a bye-law unreasonable, which is in exact accordance with the spirit of a public statute. But it is said that that statute does not apply to this case, because canals were not then known; but there is no allegation here that there were not then any, and it must not be assumed. The clause is general, that no person shall "travel on the Lord's-day with any boat, wherry, lighter, or barge:" it does not confine the prohibition to rivers only. This bye-law was drawn, in some respects, with reference to that clause in the stat. 29 Car. 2, c. 7. It is at the peril of the Company that they exercise a proper discretion; no doubt they have here done so. [*Pollock, C. B.*—Suppose the 29 Car. 2, c. 7, to be still in force, how can it be said that £5 is a reasonable sum, when the general statute says 5s. is enough?] By the Thames Act, a penalty of £5 is given, which shews that the penalty imposed by the stat. 29 Car. 2, c. 7, is not to govern the case, and that the other is a reasonable penalty in the contemplation of the Legislature. By the 37th section of this act, 9 Geo. 3, c. lxxi, the Company are empowered to

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(a) 6 T. R. 723.

(b) 10 East, 569.

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make bye-laws for the good of the Company, and for the good and orderly using the navigation. [*Alderson*, B.—This is for not using it. An “orderly using” of it must be when the person uses it.] A good and orderly use of the navigation may mean the not using it on a Sunday. It is also “for the well governing of the bargemen, &c., who shall carry goods, wares, or merchandise upon any part of the said navigation.” [*Alderson*, B.—The well governing the bargemen, &c. must mean in the carriage of goods upon the navigation. The act means to provide for the management of the canal.] The case does not turn on the question, whether the putting up of a chain was a reasonable mode of enforcing the bye-law. Every bar across a turnpike-road is perhaps on the same principle. Besides, a canal is not a highway in the general sense, but *sub modo* only; and the question of extraordinary necessity must always be for the Court or a jury.

Cowling, in reply, was stopped by the Court.

ALDERSON, B. (a).—The only question in this case is, whether this bye-law be good or not, as being within the terms of the act of Parliament. For the purpose of determining that, we must look to the powers to make bye-laws given by the Legislature to the Company, in order to see whether the bye-law is within the scope of their authority, or whether it does not relate to matters which ought to be left to the general law of the land, by which the general conduct of the Queen's subjects is regulated. The power of making bye-laws is conferred upon the Company of proprietors of this navigation by a local act, 9 Geo. 3, c. 71, s. lxxi, by which it is enacted, that “the Company of proprietors, their successors and assigns, for the

(a) *Pollock*, C. B., and *Platt*, B., had left the Court; but it was stated by *Alderson*, B., that they both concurred in the judgment.

time being, shall have power and authority to make new rules, bye-laws, and constitutions for the good government of the said Company, and for the good and orderly using the said navigation, and all warehouses, wharfs, passages, locks, and other things that shall be made for the same, and of and concerning all such vessels, goods, and commodities as shall be navigated and conveyed thereon, and also for the well governing of the bargemen, watermen, and boatmen who shall carry any goods, wares, or merchandise upon any part of the said navigation." Now, looking at these words, it appears to me that all the power which the Legislature intended to give this Company with respect to making laws for the government of this navigation, was solely for the orderly use of the navigation; that is to say, to regulate in what manner and order the navigation should be used, so as to secure to the public the greatest convenience in the use of it. The rules which they are empowered to make have nothing to do with the regulation of moral or religious conduct, which are left to the general law of the land, and to the laws of God. The rules of the Company are to be solely for the purpose of convenience, and to advance the orderly use of the navigation; such, for instance, as that A. shall not go before B.; that vessels shall not pass during particular periods, and the like,—in order that the greatest number of barges and other vessels may, with the greatest convenience, be able to pass along the navigation. That, it appears to me, is the power conferred on the Company relative to making rules "for the good and orderly using of the navigation." Then we come to the next clause, which empowers them also to make rules "concerning vessels, goods, and commodities which shall be navigated and conveyed thereon." Under this the Company may, for aught I know, have power to regulate the shape of the vessels to be used on the navigation, so as to render it most convenient for the greatest number; as, for instance, that no boats shall be employed except such as are of a certain width or

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length, &c., or the shape or mode of packing the goods and merchandise, all which are matters very fit and proper to be regulated by the Company. So, again, they are empowered by this section to make bye-laws "for the well governing of the bargemen, watermen, and boatmen who shall carry any goods, wares, and merchandise upon any part of the navigation." I do not apprehend that these words mean the government of those persons with the view of regulating their good conduct and character, but only of their conduct in their character of "bargemen, watermen, and boatmen who shall carry goods, wares, or merchandise along the navigation," that is to say, in their capacity of bargemen, watermen, and boatmen, in so far as they carry goods on the navigation. The Company are to regulate the manner of carrying goods there; but as to the moral and religious conduct of the carriers, that is a matter not left to the Company. I have now gone through all the words of the section, and none of them say that the Company are to have any power to enforce the proper observance of religious duties. I am far from saying that the object which the framers of this rule had in view was not a laudable one; but the course they have taken is not the proper one for carrying that object into effect, as I think they had no power under the statute to make such a bye-law. In doing so, they have exceeded their powers; and I am therefore of opinion, that the bye-law they have made is an illegal one, and that the demurrer must be allowed.

ROLFE, B.—I am of the same opinion. It has been contended by Mr. *Cowling*, that, by the Thames Act of 7 & 8 Geo. 4, c. lxxv, the 29 Car. 2, c. 7, s. 2, which prohibits all persons from using boats or barges on a Sunday, has been repealed. That, I think, is rather doubtful; but, in considering the subject before us, I do not think it is in the smallest degree material to determine that question. Supposing the 29 Car. 2, c. 7, s. 2, is repealed, and that it is in general lawful to use barges or boats on a Sunday, then

this bye-law is monstrous; for, if it be generally lawful to use barges on a Sunday, what right have the proprietors of a particular navigation to prevent that, and say, that, acting *pro salute animæ*, we will not allow that to be done which the law allows." But suppose, on the other hand, that the argument of the plaintiffs is right, and that the 29 Car. 2, c. 7, is still in force; then the Legislature by that act have said, that it is not decorous and proper to use barges on a Sunday, and whoever does so shall pay a penalty of 5s.; and, if so, what right has a Company to say there shall be a cumulative penalty, and the offender shall forfeit £5? It is perfectly clear, as pointed out by my Brother *Alderson*, that the Company have done something quite beyond the power which the Legislature meant to repose in them. The Legislature says, that the Company may make bye-laws "for the good and orderly navigation of the canal, and for the government of the boatmen and bargemen connected with it;" that is to say, in order that the navigation may be used with the utmost degree of convenience to every one. Now, the only point that occurred to me was this: whether, on a state of facts properly alleged, a bye-law like this might not, under peculiar circumstances, be held good. Suppose, for instance, the Company were to come to the conclusion, that, in order to secure a due supply of water in the canal, it was necessary to have no navigation on it during one day out of seven; perhaps they would have power to close the canal for one day out of seven, in order to make the navigation good during the other six, and in that case to say, "If this must be done, we will take Sunday as the fittest day." But it is not contended that that was the object of the plaintiffs in this case; they only say, that it was decorous that the canal should not be used on Sundays. That, I think, is a matter out of the cognisance of the Company, and, consequently, that their bye-law founded on that principle is *ultra vires*, and therefore illegal and void.

Judgment for the defendant.

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By a railway act (7 & 8 Vict. c. lx, s. 136), **ON** the 19th of July, 1844, the defendants, then called The Manchester, Bury, and Rossendale Railway Company were empowered to agree with the owners of lands, which they were authorised to take for the purposes of the railway, for the absolute purchase of such lands. Sect. 153 provides, "that, if the owner of any such lands, on tender of the purchase-money or compensation agreed or awarded to be paid, refuse to accept the same, or if any such person *fail to make out a title* to the lands in respect whereof such purchase-money or compensation should be payable to the satisfaction of the Company, (or in certain other cases therein specified), it shall be lawful for the Company to deposit the purchase-money or compensation payable in respect of such lands in the Bank of England, to the credit of the parties interested in such lands, &c., and thereupon all the interest in such lands should vest absolutely in the said Company." Sect. 164 provides, "that, if any difference shall arise between the Company and the owner of any such lands as to the value of the lands or the compensation to be made in respect of them, or if (inter alia) any such owner *fail to disclose or prove his title* to any such lands, in all such cases the amount of the compensation to be paid by the Company is to be attested by a jury."

By sect. 158, the Company are prohibited entering on land, except by consent, until they shall have paid to the party interested, or deposited in the Bank, the purchase-money or compensation agreed or awarded to be paid. And sect. 159 enacts, "that, if the Company shall *wilfully* enter upon any land without such consent, or without having made such payment or deposit, they shall forfeit £10; and if the Company shall, after conviction in such penalty, or after notice from the party in possession of such lands, continue in unlawful possession of any such lands, they shall be liable to forfeit £25 for every day they so remain in possession. *Provido*, that nothing shall be held to subject the Company to the payment of any such penalties, if they shall *bonâ fide* and without collusion have paid or *deposited* the compensation agreed or awarded to be paid in respect of the said lands to any person whom the Company may have reasonably believed to be entitled thereto, although such person may not have been legally entitled thereto."

Held, first, that the language of the 153rd section is prospective, and applies to the time after the purchase-money or compensation shall have been agreed or awarded to be paid; and, therefore, that the failure by an owner to disclose his title *before* the inquisition was not such a failure to make out a title as was intended by sect. 153, and that the Company were not authorised to deposit the amount awarded in the Bank, and take possession of the land, without calling upon the owner, *after* the inquisition, to make out his title.

Secondly, that the word "*wilfully*," in sect. 159, does not override the whole section, and does not extend to that part which imposes a penalty for continuing in unlawful possession after notice.

Thirdly, that the Company, who had *bonâ fide* and without collusion, though without complying with the requisites of the statute, paid the compensation awarded by the jury into the Bank of England, and taken possession of the land, were protected, by the proviso in sect. 159, from the penalties imposed by that section on the continuance in unlawful possession of land after notice.

pany (a), having purchased from the Earl of Derby the reversion of the property, served the plaintiff with a notice, that certain land, situate in the parish of Bury, in the county of Lancaster, was intended to be taken by them for the purposes of their act (b), and demanding particulars of the estate or interest of the plaintiff therein, stating that they were

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(a) Now, by the 8 & 9 Vict. c. ci, s. 6, called The East Lancashire Railway Company.

(b) 7 & 8 Vict. c. lx. By sect. 136, power was given to the Company to agree with the owners of the lands which they were authorised by the act to enter into and take for the purposes of the railway, for the absolute purchase, for a consideration in money, of any such lands, or such parts thereof as they should think proper, and of all subsisting leases therein, and all rent-charges and incumbrances affecting such lands, and all commonable and other rights to which such land might be subject, and all other estates or interests in such lands, of what kind soever.

Sect. 163, for the purpose of providing for the payment and application in certain cases of the purchase-money or compensation to be paid in respect of any lands not belonging to parties under disability, enacts, "That, in the following cases, that is to say, if the owner of any such lands, or of any interest therein, on tender of the purchase-money or compensation either agreed or awarded to be paid, refuse to accept the same, or if any such person *fail to make out a title* to the land in respect whereof such purchase-money or compensation

should be payable, or to the interest therein claimed by him, to the satisfaction of the Company, or if such owner shall be gone out of the kingdom, or cannot be found, or be not known, or shall refuse to convey or release such lands as directed by the Company, it shall be lawful for the Company to deposit the purchase-money or compensation payable in respect of such lands, or any interest therein, in the Bank of England, in the name and with the privity of the Accountant-General of the Court of Chancery, to be placed to his account therein, to the credit of the parties interested in such lands, &c., and thereupon all the interest in such lands, in respect whereof such purchase-money or compensation shall have been deposited, shall vest absolutely in the said Company."

Sect. 161 requires the Company to give notice to the parties interested, in manner therein mentioned, of their intention to treat for any lands; and by sect. 162, the parties are to state their claim within one month after such notice.

Sect. 164 provides, that, "if any difference shall arise, or if no agreement can be come to between the Company and the owner of any lands, or of any interest in such lands, taken or

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willing to treat for the purchase of such estate or interest, and as to the compensation to be made for damages; and that, if for one month after the service of that notice the plaintiff should fail to state the particulars of his claim, or to treat with the Company in respect of his interest, &c., the Company would issue their warrant to summon a jury to make such inquiry and assessment, &c.

The plaintiff took no notice of the above, and, all attempts at negotiation having failed, the Company, after notice, issued their warrant to the sheriff, on the 9th of December, to summon a jury. The inquisition was held at Bury on the 13th of January following, when the jury assessed the damages at £4084. On the delivery of the verdict, the plaintiff's attorney said to the defendants, "You shall never construct your railway till you arrange with Mr. Hutchinson."

On the 17th of February, the Company, without calling upon the plaintiff to make out his title, took possession of the land, and began to construct the railway, having paid

required for, or injuriously affected by the execution of the said railway, &c., as to the value of such lands, or any interest therein, or as to the compensation to be made in respect thereof, or if, by reason of absence, any such owner be prevented from treating, or if any such owner *fail to disclose or prove his title* to any such lands, or any interest therein, or if by reason of any impediment or disability, any such owner be incapable of making any agreement, conveyance, or release necessary for enabling the Company to take such lands, or to proceed in making the railway or works, &c., or if any such difference arise as to the amount of the damage occasioned to any lands by the temporary occupa-

tion thereof in making the railway, &c., or otherwise in the execution of the power given by the act, and for which any party may be entitled to demand compensation according to the provisions of this act, the amount of the compensation to be paid by the Company in every such case shall be settled by a jury."

By sect. 166, the Company are to give notice of their intention to summon a jury, and to state in such notice how much they are willing to give for the lands.

By sect. 223, parties claiming compensation for lands held by leases may be required by the Company to produce the leases, &c.

the amount of the verdict into the Bank of England under sect. 153, stating, as their ground for so doing, that the plaintiff had failed to make out his title to the Company's satisfaction, and had refused to convey.

On the 7th of June, the plaintiff commenced an action of ejectment against the defendants, which was tried before *Cresswell, J.*, at the Lancaster Summer Assizes, 1845; when the learned Judge told the jury, that, to entitle the Company to pay the assessed compensation-money into the Bank, and take possession of the land, they should have called upon the owner, after the assessment, to make out his title. The verdict was thereupon found for the plaintiff; leave being reserved to the defendants to move to enter the verdict for them. In Michaelmas Term,

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Baines moved accordingly.—The intention of the Legislature was clearly to vest a complete title in the Railway Company, without conveyance, where a landowner refuses to state the nature of his rights. Here he declined in the first instance, and it is plain, from his attorney's declaration, that he intended to persist. [*Pollock, C. B.*—The Court ought not to take notice of words merely used in heat.] The Company have acted bonâ fide throughout, and have commenced the railway on the faith of the 153rd section; and, reading all the enactments together, it is evident, that there has been such a failure to make out a title, as authorised them to pay the compensation into the Bank, and to take possession of the land. [*Pollock, C. B.*—The 153rd section has reference only to the time after the purchase-money is agreed for or assessed by the jury. *Alderson, B.*—No purchase-money or compensation was payable until after January, 1845. If the plaintiff were out of the country at the time mentioned in sect. 164, it would not dispense with the necessity of calling upon him, under sect. 153, after the inquisition.] The 164th section is a key to shew what is the failure of title intended by sect. 153. It

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is sufficient if it is the same land for which compensation is afterwards awarded.

POLLOCK, C. B.—I think that there ought to be no rule in this case. The language of the 153rd section, on which the question turns, seems to me perfectly clear. The only part of it which is applicable is that which enacts, that, “if the owner of any lands shall fail to make out a title to the lands in respect of which such purchase-money or compensation shall be payable, or to the interest therein claimed by him, to the satisfaction of the Company, or if such owner cannot be found, or be not known, or refuse to convey or release such land as directed by the Company, it shall be lawful for the Company to deposit the purchase-money or compensation payable in respect of such lands, or any interest therein, in the Bank of England, in the name and with the privity of the accountant-general of the Court of Chancery.” The various alternatives mentioned in this section are all alternatives arising after the assessment of the damages, and after the compensation has been ascertained. The expression in the clause, when properly construed, seems to me to be as if these words had been introduced, “or if any such person shall, after the amount of the compensation-money has been ascertained, fail to make out a title,” &c. It is a case in which it was clearly the duty of the Company to call upon the party, after the compensation had been ascertained by the verdict of the jury, to make out his title to the land if he were disposed to accept the amount awarded; and, failing that, they might pay the money into the Court of Chancery. The clause is very favourable to the Company, for they have a right to do it if he fails to make it out to their satisfaction. It is said that the Company are placed in a difficulty, in consequence of having commenced the construction of their railway on the land; but they need not have placed themselves in such a position, and unless there was some such feeling of hostility

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as was displayed in the expressions used at the inquisition, why did not the Company, when they found the plaintiff was proceeding with an ejectment, call upon him to make out a good title? It is not too late to do so now. They may still tender to the plaintiff the amount of compensation awarded, and if he refuses to accept it, may pay the money which is in Chancery to his account. The case is an important one, for it comes to this: Is a Railway Company, or any other Company, entitled to say to a person whose land they require, "Because you would not assist us before we went before the jury, we will now take your land without further communication." It appears to me, therefore, that the title of the Company is not perfect; that the interest in the land has not absolutely vested in them; and, consequently, that the lessor of the plaintiff was entitled in this action to recover back possession.

PARKE, B.—I am of the same opinion. I think, upon the true construction of the 153rd section, that the conditions which are mentioned in it, which are incurred before the Company are authorised to pay the money into the Bank, and the party must get it out again, are prospective. "If any person fails to make out a title," means after the inquisition has been executed, and the money ascertained and become payable. But admitting it, for the sake of argument, to be otherwise, and that, if the plaintiff has previously refused to make out his title, the Company would be justified in taking this course, the facts here do not support such a case, merely because there has been a refusal to disclose a title: there has not been a refusal to make the title good. The words in the 164th section, "if the party fail to disclose or prove his title," I think mean this—if he shall not disclose his title, the Company may hold an inquisition; or if, having disclosed his title, stating what it is, he cannot make out to the satisfaction of the Company that he has, in point of law and in equity, a good title to the extent

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he has disclosed it: in that case also the Company are authorised to hold an inquisition. Then, as to the acts to be done after the inquisition, I agree with the Lord Chief Baron, that the 153rd section is to be construed prospectively; and there is this good reason for it, that a party who was unable before the inquisition to make out his title might find the means of doing so after it, and ought to have the opportunity of remedying the defect before applying to the Court of Chancery. I think, therefore, that the ruling of the learned Judge was correct.

ALDERSON, B.—I am of the same opinion. The act, no doubt, in sect. 164, provides, that, if the owner of land fail to disclose or prove his title, the Company may go before a jury to assess the compensation which they are to pay him for it; for which provision there is an obvious reason, that his failing to disclose his title prevents their making him any offer satisfactorily, and his failing to prove it prevents them from making any valid agreement; so that in that case they have a right to resort to the compulsory powers. Then we come to the 153rd section, to see what is to be done where people fail to make out a good title. A man may be very much disinclined to produce his title-deeds, in order to give parties the opportunity of picking holes in it, and estimating compensation, or making an offer accordingly; and it is obvious that he ought to have an opportunity afterwards of remedying the defect. He would be in a very different situation after compensation has been awarded by a decision of a jury; and he knows what will be his fate if he makes any improper resistance. If he does, after that additional information, then the Company may go on without him. Why should we construe some words in a clause prospectively, and others not? It is palpable that one set of words must be construed as prospective, as, for instance, when the landowner is out of the country; for it is clear, that, if he were abroad at the time of the first offer, but re-

turned when the compensation was assessed, the Company would have no right at once to pay the money into the Court of Chancery. It must therefore be prospective as to that; and why not as to the other cases, when, by such a construction, we give the best effect to the section in favour of a party whose land is to be taken from him compulsorily, and by a very stringent process. The statute gives power to the Company, in some cases, to take land without any conveyance at all; for if they cannot discover who can convey to them, or he refuse to do so, they may pay their money into Chancery, and the land at once becomes vested in them by a parliamentary title. But the Company must follow the words of the act of Parliament strictly, in order to get such a power as that act gives; and they have not followed it strictly here, though a very plain course was before them. The clause therefore fails them as a defence, and, consequently, the plaintiff is still entitled to the land.

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ROLFE, B.—The object of the act was to enable the party to make out a good title, after it had been ascertained what he was to receive as compensation for his land. Here an offer was made by the Company, which the plaintiff treated as a nullity, upon which they apply to a jury to assess compensation, and it is assessed accordingly. After that inquisition, they were bound to call upon him to shew his title; they do not do it: they therefore cannot take possession of the land by merely paying the money into the Court of Chancery. It is quite obvious, that was not either within the letter or the spirit of the act of Parliament; it would be most unjust if it were. I am very glad the language of the act of Parliament warrants us in coming to this conclusion. It appears to me to be the only conclusion which justice suggests between the parties.

Rule refused.

The plaintiff thereupon issued a writ of possession; and

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on the 8th of November the defendants tendered to him the amount found by the inquisition, which he accepted. On the 11th, the sheriff entered under the writ of possession, and, on the 17th, delivered possession to the plaintiff; but afterwards, on the same day, under the Company's precept, they having in the meantime complied with the statute, he delivered it back to the Company.

An action of debt was thereupon commenced, under sect. 159 (a), to recover of the defendants a penalty of £25 per day, for continuing in the unlawful possession of the plain-

(a) By the 158th section, it is enacted, "That the Company shall not, except by consent of the owner and occupier, enter upon any lands which shall be required to be purchased or permanently used for the purposes of this act, until they shall either have paid to every party having any interest in such lands, or deposited in the Bank of England, in the manner herein mentioned, the purchase-money or compensation agreed or awarded to be paid to such parties respectively for their respective interests therein; Provided always, that, for the purpose merely of surveying and taking levels of such lands, it shall be lawful for the Company to enter upon the same without the previous consent of the owners, making compensation for any damage thereby occasioned to the owners or occupiers of such lands."

Sect. 159 enacts, "That, if the Company, or any of the contractors, shall, except as aforesaid, wilfully enter upon and take possession of any lands which shall be required to be purchased or

permanently used for the purposes of this act, without such consent as aforesaid, or without having made such payment or deposit as aforesaid, the Company shall forfeit to the party in possession of such lands the sum of £10 over and above the amount of any damage done to such lands by reason of such entry and taking possession as aforesaid, such penalty and damage respectively to be recovered before two justices; and if the Company, or their contractors, shall, after conviction in such penalty as aforesaid, or after notice from the party in possession of such lands, continue in unlawful possession of any such lands, the Company shall be liable to forfeit the sum of £25 for every day they or their contractors shall so remain in possession as aforesaid, such penalty to be recoverable by the party in possession of such lands, with full costs of suit, in any of the superior Courts: *Provided always*, that nothing herein contained shall be held to subject the Company to the payment of any such

tiffs' lands, after notice from him, being the party in possession of such lands, from the 17th of February to the 8th of November, 1845.

The cause was tried, before *Coleridge, J.*, at the Liverpool Spring Assizes, 1846. At the trial, it was objected for the defendants, that, in order to make them liable to the penalties, there must have been a wilful entry, and a continuance of possession so wilfully beginning; and that there was no evidence of such wilful entry. Secondly, that the payment into the Bank, (which they proved to have been done under the advice of counsel), under the proviso in the section, protected the Company from the penalty. The learned Judge directed the jury that the word "wilful" overrode the whole of the 153rd section, and applied to the continuing in unlawful possession as well as to the former part of the section; and that if they thought that the Company proceeded with honesty of purpose in taking the opinion of counsel as to the payment of the money into the Bank, and acted under a bonâ fide impression that it would do, they should find for the defendants, as such possession would not be wilful. The jury found for the defendants.

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In this Term (a), *Knowles* moved for a new trial, on the ground of misdirection.—First. The word "wilful" has nothing to do with bona fides, and is not affected by knowledge or ignorance of a point of law. It means "of purpose" or "intentional," and does not necessarily involve malice, as was said by Lord *Denman, C. J.*, in *Regina v. Price* (b); "The defendant has acted wilfully, though,

penalties as aforesaid, if they shall bonâ fide and without collusion have paid or deposited the compensation agreed or awarded to be paid in respect of the said lands to any person whom the Company may have reasonably

believed to be entitled thereto, although such person may not have been legally entitled thereto."

(a) April 20th, before *Pollock, C. B., Rolfe, and Platt, Bs.*

(b) 11 A. & E. 727, 738.

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in one sense, *innocently*." The defendants, therefore, were liable to the penalties for continuing in illegal possession of the land after notice, as has been frequently decided, in the case of a trespass after notice, that it is a wilful trespass within the meaning of the 8 & 9 Will 3, c. 11, s. 4. [*Pollock*, C. B.—You need not go into that question, as we are all of opinion that the word "wilfully" does not override the whole of the 159th section, but only applies to the first part of it. The decisions referred to may be binding in the cases to which they actually apply, but ought not to be extended in construing penal statutes.]

Secondly. The proviso at the end of the 158th section applies only to the case of adverse claimants. In the case of conflicting claims, if the Company, acting *bonâ fide*, mistake or cannot ascertain the right person to be paid, the proviso protects them. The words were not intended to provide for an illegal deposit, but a payment made *bonâ fide*, and without collusion, to a wrong party.

POLLOCK, C. B. —I think there is considerable doubt as to the meaning of the proviso. It is impossible to give it a strictly grammatical construction; for the word "deposited" stands alone and unconnected with anything else; we must therefore endeavour to ascertain the probable intention of the Legislature. Now, it is clear that one object was to make the payment of the price of the land a condition precedent to an entry upon it, in order to protect the public from the injury they might otherwise sustain. There is also an express provision, that, when they have paid it to the wrong party *bonâ fide*, without collusion, they shall not be liable to the penalty, though they might be liable, perhaps, to pay the money over again. It is clear, that payment even to a wrong person is *primâ facie* proof of an honest intention. I think the protection was intended to apply also to any case of *bonâ fide* deposit before taking possession, and therefore the proviso was inserted. Whatever

be the meaning, however, though in this case the Company have made a great mistake, they have deposited the money, and have not committed the grievous wrong intended to be provided against by the statute. We wish, however, before giving judgment, to consult the learned Judge who tried the cause.

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Cur. adv. vult.

POLLOCK, C. B., now delivered judgment.—We have conferred with my Brother *Coleridge* upon this case, and there will be no rule. We are all of opinion, that the proviso in the 159th section cannot be read precisely as it stands. We must give it some sensible construction; and so dealing with it, we think the section does not apply to this case; the Company having *bonâ fide*, and without collusion, deposited the purchase-money for the benefit of the vendor. Sections like this, which may be justly called penal, should be strictly construed; but a proviso, which has the effect of saving parties from penal enactments, should be liberally construed. It appears to us that this case is not within the mischief which the Legislature intended to guard against; and that we ought so to read the 159th section, as to bring the Company in this instance within the protection of the proviso at the end of that section.

Rule refused.

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COURT OF EXCHEQUER.

*In Easter Term, 1845.**May 7th.*EVANS v. The DUBLIN and DROGHEDA RAILWAY
COMPANY.

An act, 6 & 7 Will. 4, c. cxxxii, for making a railway from Dublin to Drogheda, provided that personal service of any summons or writ upon a secretary or clerk of the Company, or leaving the same at the office of the Company, or of a secretary or clerk, or delivering it to some inmate at such office of the Company, or at the last or usual place of abode of such secretary or clerk, or, in case the same respectively should not be found or known, then

BY a Railway Act, 6 & 7 Will. 4, c. cxxxii, s. 1, certain persons were incorporated by the name and style of "The Dublin and Drogheda Railway Company," with power to sue and be sued by that name, and with power to purchase, hold, and sell land, &c. By the 184th section, it is enacted, that, "in all cases in which it may be necessary for any person or corporation to serve any summons or demand, or any notice, or any writ or other proceeding at law or in equity, upon the said Company, personal service thereof upon a secretary or clerk of the said Company, or leaving the same at the office of the said Company, or of a secretary or clerk, or delivering the same to some inmate at such office of the Company, or at the last and usual place of abode of such secretary or clerk, or, in case the same respectively shall not be found or known, then personal service thereof upon any other agent of, or officer employed by, the said Company, or on any one director of the said Company, or delivering the same to some inmate of the last or usual place of abode of such agent, or officer, or director,

personal service thereof upon any other agent or officer employed by the Company, or any one director of the Company, should be deemed good service. A writ of summons was issued in England against the Company, who had no office or secretary in England, and was served upon one of the directors in England:—*Held*, that the proper service was upon the secretary or clerk at the office in Ireland, and if they could not be found, then upon a director there; but that service of an English writ of summons upon a director in England was void.

shall be deemed good and sufficient service of the same respectively on the said Company."

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The plaintiff had, on the 12th of December, 1844, sued out of this Court a writ of summons in an action of debt, and directed it "To the Dublin and Drogheda Railway Company; a director of which Company, to wit, Peter Eckersley, is resident in the city of Westminster and the county of Middlesex;" which writ was, on the same day, served on Eckersley in London. This writ Eckersley put into the hands of Messrs. Palmer & Nettleship, attornies in London, with instructions to take such steps only as should be absolutely necessary. They accordingly, on the 14th of December, communicated to the plaintiff's attornies, Messrs. Sharpe, Field, & Jackson, that they were advised by counsel that the service of the writ of summons, not being in accordance with the provisions of that statute, was bad; that it would accordingly be disregarded, and any further proceedings taken under it by the plaintiff in England would be at his own peril. The plaintiff's attornies, however, on the 20th of January, entered an appearance for the defendants *sec. stat.*; and, on their attornies refusing to accept service of declaration, or recognise the appearance, an order was, on the 23rd of January, 1845, obtained from *Alderson*, B., to allow the plaintiff to affix a copy and notice of declaration in the office of Exchequer of Pleas, and also to leave a true copy thereof at the office of Messrs. Palmer & Nettleship; and that the same be deemed good and sufficient notice of such declaration to the defendants. The copy of the declaration and particulars were immediately served on Messrs. Palmer & Nettleship, who, on the 23rd of January, forwarded them to the solicitors of the Company in Dublin, and wrote to the plaintiff's attornies to say, that, having no authority from the Company to accept service, they could not do any act which would even impliedly admit the jurisdiction of the Court; and that the plaintiff must proceed at his own peril. The plaintiff's attornies, however, disre-

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garding this, signed judgment on the 11th of February; whereupon an application was made at Chambers by Palmer & Nettleship, on the part of the Company, to set aside the proceedings; and the following order was made by *Platt, B.*, on the 14th of February:—"On hearing counsel, and reading &c., I do order, that, on payment of costs within five days, the judgment signed herein be set aside, the defendants pleading issuably within ten days; and that, in default of payment of the said costs within the time aforesaid, or pleading within the time aforesaid, the defendants' application to set aside the judgment be discharged, with costs, to be paid by the defendants to the plaintiff, or to Messrs. Sharpe & Co., his attorneys." This order having been drawn up by the plaintiff's attorneys,

Peacock, on the 23rd of April, obtained a rule to set aside the judgment and all proceedings subsequent to the writ of summons, and the above order of *Platt, B.*, if necessary, on affidavits stating the above facts; and also, that the office of the Dublin and Drogheda Railway Company, ever since its incorporation, was at No. 22, Marlborough-street, Dublin; and that the deponents believed this to have been known to the plaintiffs; and that the Company never had any secretary, office, clerk, or place of business in England, nor any director there representing or acting for the Company.

Crompton now shewed cause.—The service of the writ of summons, in London, on one of the directors of the Company, was sufficient. It would clearly be good, if made on the secretary or clerk; and there is nothing to confine the service to Ireland. This Company is not a foreign corporation, and the only object of the service is to bring them into Court. The action was brought in Middlesex, and the act must intend that service of the writ in such action must be where such a writ can be served, namely, in England. The Company have no office in England;

therefore a director may be properly served. [He also contended, that the application to set aside the judgment was too late.]

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Peacock, contra, was not called upon by the Court.

POLLOCK, C. B.—The rule must be absolute. If the Company have an office in Dublin, the action ought to be commenced there, so as to serve the process there. It is impossible to contend, that, if a writ is issued in any county in England, any director who may be induced to come into it could be served with process there. The application to set aside the judgment is not too late.

PARKE, B.—I am of the same opinion. The service of the writ ought to be in Ireland; and, if the secretary or inmates of the Dublin office cannot be found, a director may be served. But the parties capable of being served live in Ireland, and are not amenable to the jurisdiction of this Court.

ALDERSON, B.—The only proper service in this case is in Ireland, where it would probably come to the knowledge of the Company. It is only if no secretary or office could be found, that a director might be served in Ireland; but here we are asked to presume a good service from an act done in England, which would be bad if done in Ireland.

ROLFE, B., concurred.

Rule absolute, without costs.

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COURT OF QUEEN'S BENCH.

In Trinity Term, 1845.

June 3rd. THE QUEEN v. THE YORK AND NORTH MIDLAND RAILWAY COMPANY.

By a railway act, 6 & 7 Will. 4, c. lxxxi, a Company was required to make proper watering-places

for cattle in all cases where, by means of the railway, the cattle of any persons occupying lands adjacent thereto should be deprived of access to their ancient watering-places, and to supply the same with water. After the act passed, by indenture made between the Company and Sir W. M., in consideration of the latter's withdrawing his opposition to the progress through Parliament of a bill to amend that act, the Company covenanted to pay to Sir W. M., as and for the special damage to be thereby occasioned to his estate, and particularly to his mansion-house, the sum of £5000; and that whenever any close of his should be intersected by the railway, the different parts adjoining should be thrown together and properly levelled, &c., and that the Company should at their own expense make and complete such good and sufficient fences, drains, gates, stiles, and other *conveniences* as might be necessary for the re-dividing of the fields which might be intersected by the railway, and for laying them to the adjoining fields of the same estates for the purpose of convenient occupation; or otherwise would pay to Sir W. M. the costs incurred by him in so doing. The £5000 was paid by the Company.

A mandamus issued reciting the above acts, and suggesting that the Company had made their railway through and intersected eight closes of Sir W. M., in which there were ponds or watering-places for cattle, so as to cut off the ponds from one portion of the closes respectively; and that application had been made by him, Sir W. M., to the Company, but refused. The writ therefore commanded the Company to make proper watering-places for cattle in such portions respectively of the said several closes.

The return to the writ stated the indenture, and a notice under it by Sir W. M. that he required the Company to make, amongst other conveniences, the ponds in question; that they executed the works except the ponds, alleging that the cutting off the ponds was part of the damage covered by the £5000, and also that ponds were not conveniences within the meaning of the indenture.

Traverse of both these assertions, and demurrer to the traverse.

The Court of Queen's Bench *held*, that the indenture furnished no sufficient answer; that, even if the ponds could be included in the word "*conveniences*," they were not intended to be provided for by the £5000. A peremptory mandamus was therefore issued.

But *held*, by the Court of Exchequer Chamber, (reversing the award of the peremptory mandamus by the Court of Queen's Bench), that the writ was bad, as it ordered the Company to do more than the act required, namely to make a pond in each of the portions of the closes, there being nothing to shew that one watering-place would not have been sufficient for all the portions.

spective successors, should and might be united into a Company for making and maintaining a railway, &c., and should be a body corporate, by the name and style of 'The York and North Midland Railway Company;' and that it was enacted by the said act (s. 88), "that the said Company should from time to time, at their own expense, make such arches, tunnels, culverts, drains, or other passages over, under, or by the side of the said railway, and the fences on the sides thereof respectively, of such breadth, depth, and dimensions, as should be sufficient at all times to convey the water as clearly from the lands adjoining or lying near to the said railway as before making the said railway, without obstructing or impounding the same in any way to the prejudice of any of the said lands, and also to make proper watering-places for cattle, in all cases where, by means of the said railway, the cattle of any person occupying lands adjacent thereto should be deprived of access to their ancient watering places, and to supply the same at all times with water from such rivers, brooks, streams, or springs of water, as would have supplied the cattle of such persons if the said railway had not been made, or from any other source or feeder which could lawfully be obtained for that purpose;" and also that another act passed (7 Will. 4 & 1 Vict. c. lxxviii), to alter and amend the former act; and that the Company, under the powers of said several acts, had made and carried the railway through and intersected certain closes of land, the property of Sir W. M. Milner, Bart., in the several occupations of A, B, C, &c., numbered, &c. (being eight in the whole), and in which said several closes of land there were ancient ponds or watering-places for cattle; and that, by means of the said railway having so intersected the said closes, the said ancient ponds or watering-places for cattle had been severally cut off from one portion of the said closes respectively, and the cattle of the said A, B, C, &c., respectively occupying such portions of the said closes, as aforesaid, had been thereby deprived of access to their ancient watering-places; and that, in pursuance of the provisions of the said acts of Parliament,

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the Company ought, at their own costs and charges, to make proper watering-places, in such portions of the said closes of land respectively as had by means of the said railway been cut off and intersected from the several ancient ponds or watering-places for cattle therein, and in which the cattle of the said A, B, and C, respectively occupying the same, as aforesaid, had been deprived of access to such ancient watering-places as aforesaid, and to supply the same at all times with water when made; and that application by a notice in writing, under the hands of Sir W. M. Milner, A, B, C, &c., dated the 25th of March 1843, had been made to the Company, in pursuance of the provisions of the said acts, to make such watering-places as aforesaid, that is to say, &c. (specifying them), but that the Company had wholly neglected and refused, &c." The writ then commanded the Company, at their own proper costs and charges, to make, or cause to be made, proper watering-places for cattle, in such portions respectively of the said several closes of land as last aforesaid, and to supply the same at all times with water when made, pursuant to the aforesaid application made to them in that behalf, and to the provisions of the said acts of Parliament.

Return, that the within-mentioned closes of land, at the time of making the indenture hereinafter mentioned, were, and still are the property of Sir W. M. Milner, parcel of other lands of which he the said Sir W. M. Milner was then seised or otherwise entitled to; and that, after the passing of the act of Parliament first within mentioned, and during the passing through Parliament of the bill for the act secondly within mentioned, and before the making and carrying the within-mentioned railway through the said closes of land as within mentioned, to wit, on the 1st of May, 1837, by a certain indenture then made between the said Company of the one part, and the said Sir W. M. Milner of the other part, and sealed, &c., it was covenanted, &c., that in case the said Company should make and carry their railway through the said lands and tenements of the said Sir W.

M. Milner, in the altered line, as proposed by the said bill for the second within-mentioned act, and then intended to be authorised by the said last-mentioned act, they, the said Company, should pay to the said Sir W. M. Milner, as and for the special damage to be thereby occasioned to the said lands and tenements of the said Sir W. M. Milner, of which the within-mentioned closes then and still are severally part and parcel, and particularly to a mansion-house of his, called Bolton Lodge, the sum of £5000; the sum to be paid by the said Company in manner therein mentioned, to be exclusive of the value of the land which the said Company would require for the purposes of the said railway, and the ordinary damages which the said Company might commit, either to the said Sir W. M. Milner or his tenants, which land and damages were to be valued and paid for by the said first-mentioned act, unless the said parties to the deed should otherwise agree. And it was in and by the said deed of covenant further covenanted and agreed by and between the said Company and the said Sir W. M. Milner, that whenever any close or parcel of land or ground belonging to him should be intersected by the said railway, the part or parts of such close, piece, or parcel of land on each side of the said railway, or either of them, as the case might be, should, if the adjoining land belonged to the said Sir W. M. Milner, and if he should require the same, be thrown into the adjoining lands, by removing the fences and properly levelling the sites, and soiling the same in a sufficient and workmanlike manner; and that the said Company should and would, at their own expense, make and complete such good and sufficient *fences, drains, gates, stiles, and other conveniences*, as might be necessary for the re-dividing of the fields in the same estates which should be intersected by the said railway, and for laying them to the adjoining fields of the same estates, *for the purpose of convenient occupation*; or, otherwise, would pay on demand to the said Sir W. M. Milner, the reasonable costs and expenses he might be put to in making and executing such fences and other works as

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aforesaid, to be recovered in default of payment by action of debt or on the case, in any of her Majesty's Courts of record at Westminster—(other provisions of the deed were also set out, which are not material); and that, on the 8th of July, A.D. 1837, the Company paid Sir W. M. Milner the £5000, in full satisfaction and discharge of the special damage, &c. And that, after the passing of the act secondly mentioned, and before the application of the 25th of March, 1843, viz. in April, 1840, the said Sir W. M. Milner caused to be served on the said Company a notice, together with a plan, and an explanation of the said plan respectively—(the notice was set out in the return, and called on the Company, in pursuance of the deed of covenant of the 1st of May, 1837, to make various fences, drains, crossings, gates, and ponds, specified in the plan and explanation); and that the Company did, in compliance with the said notice so served upon them in the month of April, 1840, and long before the making of the said application to them by the notice in writing of the 25th of March, 1843, make, complete, and execute the said fences, drains, and other works connected therewith, as specified in the said explanation under the head of fences and drains, and also the said crossings on the railway in the said explanation specified under the head of crossings on the railway, and also the said gates in the said explanation specified under the head of gates, except one; and that the said ponds in the said explanation specified under the head of ponds, were and are the same identical ponds as were specified and required to be made in and by the notice, bearing date the 25th of March, A.D. 1843; and that the cutting off the said ponds and watering-places as within mentioned, and the damage thereby occasioned to the said Sir W. M. Milner and his said estate, as within mentioned, were and are part and parcel of the damages which were in and by the said indenture covenanted and agreed to be compensated, valued, and paid for, as herein in that behalf above mentioned; and that the said ponds so required to be made by the said Company, as aforesaid, were and are convenient

ces which the said Company, in and by the said indenture, covenanted to make and complete, at their own expense, as above in that behalf mentioned.

To this return there was a traverse, setting out at length the indenture of the 1st of May, 1837. [By this indenture it appeared, that the £5000 was paid, and the covenant before set out was entered into by the Company with Sir W. M. Milner, in order to carry out an agreement made by him with the Company, that he would withdraw his opposition to the second bill, which carried the line of railway nearer his mansion, and was in other respects more injurious to his property than the first, on receiving a full and adequate compensation for the special damage which should be occasioned to his property by reason thereof.] And the traverse of the return concluded with the following special traverse:—

“Without this, that the cutting off of the said ponds and watering-places, as in the said writ mentioned, and the damage thereby occasioned, as in the said writ mentioned, were or are part and parcel of the damages which were in and by the said indenture covenanted and agreed to be compensated, valued, and paid for, as in the return in that behalf mentioned, in manner and form as in the said return is in that behalf alleged; and this the said Sir W. M. Milner, A, B, C, &c. pray may be inquired of by the country. And the said Sir W. M. Milner, A, B, C, &c., by force of the said statutes in that behalf made and provided, as to so much of the said return as states and alleges that the ponds required to be made by the said Company were and are conveniences which the Company in and by the said indenture covenanted to make and complete, at their own expense, say, that the said ponds so required to be made by the said Company, as in the said writ and return mentioned, were not nor are, nor were nor are any of them, conveniences which the said Company, in and by the said indenture, covenanted to make and complete at their own expense, in manner and form as is in the said return alleged;

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and this the said Sir. W. M. Milner, A, B, C, &c. pray may be inquired of by the country."

Demurrer, and joinder.

Wortley (*Addison* with him), in support of the demurrer, took four objections to the traverse:—1. That it attempts to put in issue matters of law. 2. That it is argumentative. 3. That it is too narrow. 4. That it traverses part of the return and not the whole. The same question is, in substance, raised by all the objections, namely, what is the construction to be put upon the covenant in the indenture? The Company contend, that the making of the ponds could not be enforced under the act, it being one of the subjects of the special damage for which £5000 was paid to Sir W. M. Milner, who might have sued them in covenant for not making the ponds, or for the expenses incurred by his making them himself. [*Patteson*, J.—I do not see how watering-places are within the covenant. They are not necessary for re-dividing and laying together the closes. The words seem to refer to the size and position, not the convenient occupation of the closes.] They cannot be laid together for convenient occupation, unless the access to water is preserved; and if a sufficient remedy is open under the covenant, the Court will not issue a mandamus.

Knowles (*H. Hill* with him), contra.—The return to the mandamus is inconsistent. It states, first, that this was special damage, for which the Company were bound to give, and did give, special damages; and, secondly, that this was one of the conveniences which they were bound to make, and for the neglect of which they might be sued. That is in effect pleading payment, and that there is another remedy: *Rex v. The Mayor, &c. of Cambridge* (a), *Rex v. The Mayor of York* (b).

(a) 2 T. R. 456.

(b) 5 T. R. 66.

But this is not an injury included in the covenants of the indenture. Its object was to provide compensation for damages which were not provided for by the act of Parliament. This damage is provided for expressly by sect. 88. The Company, when they are called upon to make the ponds under the indenture, in effect say, they are not included in the indenture; and their answer to a mandamus is, that they are included in the indenture.

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Wortley, in reply, as to the first point, cited *Wright v. Fawcett* (a) and *Rex v. The Churchwardens of Taunton, St. James* (b).

Cur. adv. vult.

LORD DENMAN, C. J., now delivered the judgment of the Court.—This was a mandamus commanding the defendants, in pursuance of the act of Parliament under which they are incorporated, to make ponds or watering-places in certain closes or pieces of land intersected by the railway, as prescribed by the 88th section of that act. The defendants had made a return, stating an indenture between Sir W. M. Milner, the prosecutor of this writ, and themselves, by which, in consideration of his not opposing the alteration of their line, it was agreed that they should pay to Sir W. M. Milner, as and for the special damage thereby occasioned to the lands and tenements of the said Sir W. M. Milner, and particularly to a mansion-house of his, called Bolton Lodge, the sum of £5000, to be paid as therein mentioned, and to be exclusive of the value of the land which the Company would require for the purposes of the said railway, and damages which the Company might commit either to the said Sir W. M. Milner or his tenants, and which land and damages were to be valued and paid for by the Company in the manner provided for by the act, unless the parties to the deed should otherwise agree; and, further, that whenever any closes or pieces or parcels of land belonging to him should

(a) 4 Burr. 2041.

(b) Cowp. 413.

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be intersected by the railway, and if the adjoining land belonged to Sir W. M. Milner, and he should require the same, those parts on each side of the railway should be thrown into the adjoining land, by removing the fences, drains, gates, and stiles in a sufficient and workmanlike manner; and that the Company should and would, at their own expense, make and complete such fences, drains, gates, and stiles and other conveniences, as might be necessary for the re-dividing of the fields on the same estate which should be intersected by the railway, and for laying them to the adjoining fields of the said estate for the purpose of convenient occupation. The defendants then state, that Sir W. M. Milner gave notice, that, in pursuance of the deed, he required them to make such fences, drains, gates, stiles, and other conveniences, as might be necessary; setting out as one head of the works he required to be done, the ponds which are the subject of this writ. The defendants say they executed the works required, except the ponds, and they conclude by alleging that the cutting off of ponds and watering-places, as stated in the writ, and damages occasioned thereby, were part of the special damages covered by the £5000; and, further, that the ponds they are required to make were not conveniences within the meaning of the indenture last set forth. Sir W. M. Milner has traversed both these assertions, to which the defendants have demurred.

Technical objections were taken on both sides. It was argued, that the matters are matters of law and not of fact; on the other hand, it was argued that the return is bad and is repugnant. We do not enter into these objections, as we are of opinion the indenture furnishes no sufficient answer to the writ. The special damages for which the £5000 were paid, are evidently such as were peculiar to Sir W. M. Milner in the alteration of the line, of whatever nature they may be, and not such damages as might happen to any person whose lands were intersected; such damages are, in the very clause of the indenture, point-

ed out as ordinary damages, and the 88th section of the act provides for them in terms. The indenture was made on the 1st of May, 1837, long after the act, which passed on the 21st of June, 1836; and the clause in the indenture seems almost exactly to refer to that section among others in the act. With respect to the other clause in the indenture, it is plain the word "conveniences" there used does not apply to all things necessary for the occupation of the land, but to all things necessary for the re-dividing and laying the intersected closes to the adjoining land for the purpose of convenient occupation; it is the laying the lands together to which those words must be applied, not to making fences and other conveniences: added to which, the 88th section obliges the Company to supply water, and gives them power to go even over the lands of a third person, which, if the clause of the indenture were to receive the construction of the defendants, would relate only to making ponds on the lands of Sir W. M. Milner. At all events, it cannot alter the obvious meaning of the indenture itself. Upon the whole, we are of opinion that the prosecutor is entitled to our judgment, and the peremptory writ of mandamus must issue.

Rule absolute for a peremptory mandamus.

IN THE EXCHEQUER CHAMBER.

In Trinity Vacation, 1846.

THE YORK AND NORTH MIDLAND RAILWAY COMPANY
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A WRIT of error brought on the above judgment of the Court of Queen's Bench, under the 6 & 7 Vict. c. 67, s. 2, was argued, May 9th, 1846, before *Tindal, C. J., Maule,*

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Cresswell, and *Erle*, Js., and *Parke* and *Platt*, Bs., by *Martin*
 for the plaintiffs in error, the defendants below, and *Knowles*
 contra.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the Court.—In this case a writ of mandamus issued, which recited the passing of an act of Parliament, 6 Will. 4, incorporating the North Midland Railway Company, and giving them powers to make a railway; and that it was enacted, that the Company should, at their own expense, make such arches, tunnels, culverts, drains, or other passages, over, under, or by the side of the railway, and the fences on the side thereof respectively, of such dimensions as should be sufficient at all times to convey the water as clearly from the lands adjoining or lying near to the said railway, as before the making of the said railway, without obstructing or impounding the same to the prejudice of any of the said lands; and also, that the said Company should make proper watering-places for cattle in all places, where, by means of the said railway, the cattle of any person occupying lands adjacent thereto should be deprived of access to their ancient watering places, and to supply the same at all times with water from such rivers, brooks, feeders, or springs of water, as would have supplied the cattle of such person if the said railway had not been made, or from any other source or feeder which could lawfully be obtained for that purpose; and which recited, also, that another act was passed, 1 Vict., enabling the Company to alter their line, to which act all the former provisions were extended; and that the Court had been informed, that the Company, under the powers of the said acts, had made the railway through and intersected certain closes of Sir W. Milner, numbered &c., in the occupation of his tenants, in which closes there were ancient ponds or watering-places for cattle; and that, by means of the railway having so intersected the said closes,

the said ancient ponds or watering-places for cattle had been severed and cut off from one portion of the said closes respectively, and the cattle of the said tenants respectively occupying such portion of the said closes had been thereby deprived of access to their ancient watering-places; and that the Company had been required to make proper watering-places for cattle in such portions of the said closes respectively, but had neglected to do so: wherefore they were commanded "to make, at their own cost and charges, proper watering-places for cattle, in such portions respectively of the said several closes of land, and to supply the same at all times with water, &c. The Company returned an indenture made between them and Sir W. Milner, between the passing of the first and second acts, whereby they covenanted to pay him £5000 for the special damage which he would sustain by reason of the railway passing through his land, and to make certain conveniences, and do certain other acts, in the event of any of his fields being divided; that the cutting off a portion of the fields in the writ named was part of the special damage sustained by Sir W. Milner; and that the ponds required to be made were conveniences which the Company had covenanted to make. Sir W. Milner traversed both branches of this return, to which the Company demurred specially, and the Court below gave judgment, that the return was insufficient, and awarded a peremptory mandamus.

A writ of error was brought under the provisions of 6 & 7 Vict. c. 67, and the case was argued before us after Easter Term, when two questions were raised: first, whether the writ of mandamus was good; and, secondly, whether the indenture made between the parties substituted the obligation therein contained for that which was imposed by the act of Parliament. Upon the first question it was contended, that the writ was erroneous, for that the cutting off of a portion of a field from the residue, and thereby depriving the cattle in one portion of access to water in the

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other, was a damage provided for by the 21st section of the act; and that, if Sir W. Milner sustained such damage, he should have sought compensation in the manner thereby pointed out. Secondly, that the 88th section, upon which the writ of mandamus was founded, did not at all apply to cases where fields were intersected by the railway, but to cases where the railway did not pass through the lands, but prevented the cattle in lands adjacent from going out of those lands to their usual watering-places, not being in the same lands, but elsewhere; and thirdly, that, even if the injury sustained by Sir W. Milner was one for which he could have a remedy by mandamus, the writ was erroneous in ordering the Company to do more than the act required; for that it orders them to make a pond in each of the several portions of the fields which have been cut off from the residue of such fields by the railway, whereas the 88th section, if applicable at all, merely requires that they should make proper watering-places.

It is unnecessary to give an opinion upon the two first objections, as we are of opinion that this last objection to the writ is well founded; there is nothing on the face of it to shew that eight ponds are necessary to or proper for the occupation of the eight portions of fields that have been severed from the other parts in which there were ponds before; and it is quite consistent with all that appears on the face of the writ, that one watering-place would have been sufficient and proper for the whole of them. The writ, therefore, commands something to be done which is not shewn to be required by the statute, and is therefore not valid in law; and the judgment of the Court below, awarding a peremptory mandamus, must be reversed.

Judgment reversed.

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COURT OF QUEEN'S BENCH.

In Trinity Term, 1845.

THE QUEEN v. The BRISTOL & EXETER RAILWAY CO.

June 11th.

IN Easter Term last, *Kelly* obtained a rule nisi calling upon the Bristol and Exeter Railway Company to shew cause why a mandamus should not issue, commanding them forthwith to pay to Messrs. W. & T. Elworthy the sum of £8 per week, from the 13th of April, 1844, pursuant to the memorandum of agreement of the 28th of January, 1843, together with the costs of and occasioned by their refusal to pay such sum; or commanding them, in pursuance of their act, within ten days, to issue their warrant to the sheriff of Somerset, to summon a jury to assess, &c. the sum of money to be paid by the Company to the Messrs. Elworthy, by way of compensation for the damage sustained, or which may be sustained, by them in their factories, &c. by reason of certain works done by the Company under their acts; or why a rule of the 25th of January should not be revived.

He moved upon affidavits, which stated, that the claimants, who were woollen manufacturers at Wellington, in the county of Somerset, were the owners in fee of certain mills built on a stream. That, in making the Bristol and Exeter Railway, and particularly certain cuttings and tunnels in that neighbourhood, the springs were cut, and the water fouled, so as to be unfit for use in the claimants' business. That, in April, 1842, complaint was made of the

A rule nisi having been obtained for a mandamus to a Railway Company to summon a jury to assess compensation for damage under their act, the following agreement was entered into by their agent and the claimant:—
 "We do hereby agree to accept of the Company, in discharge of our claim against them for injury, &c., the sum of £425, and £8 per week for the future, as long as the present damages continue. (Signed) W. E., T. E."
 This was also signed by the agent of the Company. Upon this agreement the proceedings for the mandamus were discontinued.

continued. The Company paid the £425, and also the £8 per week for several weeks, and then ceased, whereupon an application was made for a mandamus to them to pay the money according to the agreement, or to summon a jury to assess compensation, or to revive the former rule:—

Held, that, as the agreement was not under the seal of the Company, it could not be enforced by action; and the Court granted the mandamus.

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injury ; and that, after a long correspondence and many communications between the parties, a rule nisi was granted on the 25th of January, 1843, for a mandamus to the Company to issue their warrant to the sheriff of Somerset to summon a jury to assess compensation for the injury sustained or to be sustained by the claimants, by reason of the works of the Company.

That, thereupon, Mr. Badham, the agent of the Company, had a conference with the claimants, and agreed upon the damages ; and the following memorandum of agreement was entered into :—

“ Wellington, January 28, 1843.

“ We, the undersigned, do hereby agree to accept of the Bristol and Exeter Railway Company, in discharge of our claim against them, for injury and damage sustained in consequence of the hardening and discolouring of the water flowing to our mills from the works now in progress at the tunnel, the sum of £425, and the sum of £8 per week for the future, as long as the present recurring damages are continued, or until the same shall have been suspended or removed by any means adopted by the Company for their discontinuance, the said sums to be in discharge of all law expenses, or otherwise, already incurred.

(Signed)

“ WM. ELWORTHY,

“ THOS. ELWORTHY.

“ For the Railway Company,
 but subject to their approval.

“ W. H. TOWNSEND.”

That the Company ratified this agreement by paying the £425, whereupon the proceedings in the Court of Queen's Bench were discontinued. They also paid the £8 per week up to the 13th of April, 1845, when they ceased the payment ; stating, in answer to the application made for it, that they did not consider the claimants any longer entitled to compensation. After another long correspondence on the subject, the present rule was applied for and obtained.

Gurney and Carrow now shewed cause (a).—There is a distinct answer to this application for a mandamus, that there is another specific legal remedy : *Regina v. The Hull and Selby Railway Company* (b). Here an action of debt will lie on the statutory obligation, which has been ratified by the Company in the agreement made by their agent, and the payment of the £1500 under it was an adoption by them which would obviate any objection to the agent's authority : *The London and Birmingham Railway Company v. Winter* (c). In such case the law will raise a mutual obligation between the parties : *The Mayor of Stafford v. Till* (d). The Court will never grant a mandamus to enforce the general law of the land which may be enforced by an action : *Ex parte Robins* (e).

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Kelly, (*Crowder* and *M. Smith* with him), contra.—The agreement is not binding on the Company, as it is not under their seal. It is signed by the claimants, but only by Mr. Townsend for the Company, and that subject to their approval. Even if it were under seal, it would be almost impossible to maintain an action upon it. If anything, it is only an implied agreement. [He was stopped by the Court.]

PER CURIAM.—This rule must be absolute. *Regina v. The Mayor of Stamford* (f) is a distinct authority that such an agreement by a Company should be under their seal.

Rule absolute (g).

(a) Before Lord Denman, C.J.,
Patteson, and *Williams*, Js.

(b) Ante, p. 705; 6 Q. B. R. 70.

(c) 1 Cr. & Ph. 57.

(d) 4 Bing. 75.

(e) 7 Dowl. 566.

(f) 6 Q. B. R. 433.

(g) See *Hall v. The Mayor, &c. of Swansea*, 5 Q. B. R. 526.

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COURT OF EXCHEQUER.

In Trinity Vacation, 1845.

July 9th. **MACINTOSH v. The MIDLAND COUNTIES RAILWAY COMPANY.**

DEBT.—The declaration stated, that heretofore, to wit, on the 19th of December, 1837, by an indenture then made between the Midland Counties Railway Company of the one part, and the plaintiff of the other part, after reciting (inter alia) that the said Company had, under the powers of their act of Parliament, determined to make a railway, commencing in Rugby, in the county of Warwick, and terminating in the township of Long Eaton, in the county of Derby; and that the plaintiff was willing to contract with the Company to execute the works described in certain specifications, &c. of the engineer of the Company; and that the Company on or before the 1st of May, 1840; that afterwards, by another indenture of March, 1839, in consideration of the further sum of £1500, the plaintiff covenanted with the defendants, that he, being provided by them with bars or rails and chairs for temporary and permanent use, would complete the said railway, and certain other works, on or before the 1st of June, 1840; provided that, if the plaintiff should not complete the said railway by that day, he should pay the defendants the sum of £300, and the like sum for every succeeding day until the work should be completed, so that the whole amount forfeitable should not exceed £15,000. Breach, that the defendant detained from and did not pay the plaintiff £20,000, parcel, &c. Plea, as to £7500, parcel of the £20,000, that the said sum of £7500 is parcel of the sum of £15,000 agreed to be retained by the defendants; that the plaintiff did not complete the railway on the 1st of June, 1840, nor until twenty-four days after, whereby the plaintiff then became liable to pay the defendants the sum of £300 per day for the twenty-five days during which the railway remained incomplete; by reason of which the defendants deducted and retained the said sum of £7500 out of the monies payable by them to the plaintiff. Replication, that the plaintiff did not become, nor was liable pay the defendants, modo et formâ.

At the trial, it was proved that the plaintiff did not complete the railway until twenty-four days after the 1st of June, but that the defendants had not provided him with sufficient bars or rails and chairs to enable him to complete it by that day; whereupon the learned Judge directed the jury that such supply was a condition precedent to the defendants' right to deduct the penalty:—*Held*, that this was a misdirection, the covenants being independent, and the supply of the bars, &c. not a condition precedent to the right of the defendants to make the deduction.

pany had agreed to advance to the plaintiff, from time to time during the progress of the works so contracted to be executed by him, sums of money by way of instalments upon account of and in part payment for the works then actually done and executed by him, such execution to be certified by the resident engineer of the Company for the time being; and that, upon completion by him of the works so to be executed, and upon the maintenance thereof by him for one year, such completion and maintenance also to be certified as thereafter mentioned, he the plaintiff was to receive the remainder of the monies due to him upon the said contract:—It was witnessed, that, in consideration of 258,629*l.* 10*s.* 6*d.* agreed to be paid by the said Company in manner thereafter mentioned, he the plaintiff covenanted with the said Company and their successors to make and complete a portion of the said railway, (therein particularly described), and to provide (inter alia) all such railway bars or rails and chairs as might be necessary for temporary use in the construction of the works, except such railway bars or rails and chairs as were thereafter covenanted to be provided by the said Company, and to complete the said works, and to deliver over the same so completed to the said Company, on or before the 1st day of May, 1840, and to maintain the said railway for one year thereafter. And it was by the said indenture further witnessed, that, in consideration of the premises, the Company covenanted with the plaintiff, that they should and would pay the said sum of 258,629*l.* 10*s.* 6*d.*, or such other sum as should become payable, to the plaintiff, at the times and in manner following; (that is to say), at the expiration of four weeks from the day on which the works should have been commenced, or within fourteen days thereafter, nine tenth parts of the whole amount or value of the works and materials which should have then been executed and provided by the plaintiff; and so from time to time, at the expiration of every succeeding four weeks, until the sums retained in the

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hands of the Company should amount to £10,000, they should in like manner pay to the plaintiff nine tenth parts of the whole amount or value of the said works and materials then actually performed and provided; and, from the time when the sums so retained should amount to £10,000, they should, at the expiration of every succeeding four weeks, pay to the plaintiff nineteen twentieth parts of the whole amount of such work and materials which should have been performed or provided during the next preceding four weeks, until the whole sums retained by the Company should amount to £15,000; after which time the Company should, at the expiration of every succeeding four weeks, until the whole of the works should have been executed, pay to the plaintiff the full amount or value of the works and materials performed and provided during the next preceding four weeks; and should, at the expiration of three calendar months after the whole of the works should have been completely finished by the plaintiff, to the satisfaction of the principal engineer of the Company, pay to the plaintiff four-fifths of the whole sum retained by them, and the remaining one-fifth at the expiration of one month from the date of the engineer's certificate that the said railway had been well and substantially maintained by the plaintiff for one year. And it was thereby agreed, that the Company should find and provide for the plaintiff, for his temporary use in the construction of the works, a portion of the permanent bars or rails and chairs, and that the plaintiff might use the same for laying temporary roads or railways to be used in the execution of the works; and that the Company should deliver the same in twelve equal monthly quantities, commencing on the 1st of January, 1839, and so on, on the first day of every succeeding month, until the whole should have been delivered, &c. The declaration then stated, that, by another indenture, made between the Company of the one part, and the plaintiff of the other, dated 23rd of March, 1839, reciting that the plaintiff had further agreed

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to contract with the Company for laying the permanent line of railway on the portion of the railway comprised in his contract, and that he had agreed to expedite the works, so that the whole line of the railway might be opened for the use of the public on the 1st of June, 1840, in consideration of the Company agreeing to pay him the further sum of £15,000, in addition to the said sum of 258,629*l.* 10*s.* 6*d.*, in consideration for such expedition and completing the same as aforesaid:—It was witnessed, that, in consideration of the further sum of £15,000, the plaintiff covenanted with the Company, that he, the plaintiff, being provided by the Company with railway bars or rails and chairs, for temporary and permanent use as thereafter mentioned, would complete the said portion of the said railway, and the line of the permanent railway, on or before the said 1st of June, 1840. Provided, that, in addition to the permanent railway bars or rails and chairs, which had been delivered or agreed to be delivered in pursuance of the original contract, for the plaintiff's temporary use in the construction of the works, and which thereby were declared to amount to 300 tons, the Company should and would, at their own costs and charges, provide and deliver, at &c., all such further railway bars or rails and chairs, as should be requisite or necessary for making and completing the said permanent way, in such quantities and at such times as thereafter mentioned; viz. 300 tons on or before the 1st of April 1839, 300 tons on or before the 1st of May, 300 tons on or before the 1st of June, 300 tons on or before the 1st of July, 450 tons on or before the 1st of August, 500 tons on or before the 1st of September, 500 tons on or before the 1st of October, 300 tons on or before the 1st of November, and 300 tons on or before the 1st of December following. And the Company thereby covenanted with the plaintiff to pay him the said additional sum of £15,000 as the consideration for his so expediting the works, and completing the whole of the

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said railway by such time as before mentioned, subject nevertheless to such deductions thereout as thereafter mentioned, by such monthly instalments, in respect of the works and materials from time to time actually performed and provided, as by the original contract the said sum of 258,629*l.* 10*s.* 6*d.* was made payable, and as if the said sum of £15,000 had originally formed part of the consideration for the original contract. Proviso, that, in case the plaintiff should not complete the whole of the said railway on or before the said 1st day of June, 1840, so that it might be capable of being opened by the said Company for the use of the public on that day, then and in such case the plaintiff should and would, on demand, pay to the said Company the sum of £300 for the said 1st of June, and the like sum for every succeeding day (Sundays only excepted) until the whole of the said railway should have been so made and completed, and delivered over to the said Company, capable of being opened by them to the public as aforesaid; but so, nevertheless, that the total amount to become forfeitable or payable by the said plaintiff should not exceed in the whole the sum of £15,000. Averment, that the plaintiff did, to wit, on the 20th day of March, 1839, and on divers days and times between that day and a certain day and year, to wit, the 1st day of June, 1840, make and complete the whole line of the said railway. Breach, that the defendants detained from and did not pay to the plaintiff a large sum, to wit, the sum of £20,000, parcel of the sum due to the plaintiff, &c.

Fifth plea, as to the sum of £7500, parcel of the said sum of £20,000, that the said sum of £7500 was and is parcel of the said sum of £15,000 so agreed to be retained by the defendants as aforesaid; that the plaintiff did not complete the said railway, and deliver the same to the defendants, so as that it might be capable of being opened for the use of the public on or before the 1st day of June, 1840, nor until the expiration of twenty-four days there-

after (excepting Sundays), whereby the plaintiff then became liable to pay to the said defendants, on demand, the sum of £300 for the said 1st of June, and the like sum for every of such succeeding twenty-four days (Sundays excepted) during which the said railway remained incomplete and undelivered over to the defendants; by reason of which the defendants deducted and retained the said sum of £7500 out of the monies payable by them to the plaintiff.

Replication, that the plaintiff did not become nor was liable to pay the defendants on demand, in manner and form, &c.

At the trial of the cause, before *Pollock*, C. B., at the sittings in London after last Hilary Term, the deeds set forth in the declaration were proved; and it was also shewn, that the plaintiff did not complete the portion of the railway in question, until the lapse of twenty-four days after the 1st of June, 1840, but that he was not supplied by the defendants with bars or rails and chairs at the times and in the quantities specified in the deed of 23rd of March, 1839, nor in sufficient quantities to enable him to complete it by the 1st of June, 1840. It was contended for the defendants, that they were nevertheless entitled in this action to deduct the sum of £7500 from the £15,000 payable to the plaintiff under the deed, being after the rate of £300 per day from the 1st of June, 1840, subsequent to the day when the work was in fact completed; and that the remedy against them for the non-supply of the rails and chairs was by a cross action: and evidence was also tendered on behalf of the defendants, to shew that the non-supply of the rails and chairs was not the *sole* cause of the non-completion of the work in due time. The Lord Chief Baron was however of opinion, that the supply by the defendants of a sufficient number of rails and chairs to enable the defendant to complete the work by the 1st of June, 1840, was a condition precedent

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to their right to make any deduction from the £15,000; and he therefore rejected the evidence tendered, and under his direction a verdict was found for the plaintiff for the whole amount claimed by him.

In Easter Term, *Kelly* obtained a rule nisi for a new trial, on the ground of misdirection, and of the exclusion of the above evidence, or for arresting the judgment.

Martin, Cowling, and M. Smith shewed cause (a).—The evidence received on behalf of the plaintiff was admissible, and the direction to the jury right. The question turns on the construction of the deed of the 23rd of March, 1839. It is admitted that the rails and chairs were not supplied by the defendants according to that deed, and the supply of them by the defendants is a condition precedent to the attaching of the penalty, and their right to deduct £300 per day from the sum of £15,000, which was to be paid to the plaintiff for expedition. There can be no doubt, that, in an action for the penalty, an averment of the supply of the rails and chairs would have been necessary, and so in a declaration in covenant. The penalty is to be deducted out of the entire sum payable to the plaintiff under both deeds, not out of the £15,000 alone. A party seeking to enforce a penalty of this kind must bring himself strictly within the terms of the contract: *Holme v. Guppy* (b).

Peacock (*Kelly* with him), *contra*.—The supply of the rails and chairs was not a condition precedent to the attaching of the penalty. The covenants are independent. The plaintiff covenanted to complete the work by a certain day, which he failed to do, and therefore was not entitled to the sum he claimed. If his failure was caused by the default of the defendants in not supplying what they covenanted to

(a) May 6th and 7th, before *Pollock, C. B., Alderson, Rolfe,* and *Platt, Bs.*
 (b) 3 M. & W. 387.

do, his remedy is by a cross action for damages. The plaintiff was bound to shew the work done, which is the only issue, and not having done so, was not entitled to recover in this action. The defendants therefore are entitled to the verdict on the fifth plea (a).

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ALDERSON, B., now delivered the judgment of the Court.—In this case we think there ought to be a new trial. The question turns on the fifth plea to the declaration. The action is founded on two deeds of covenant; by the first of which, after various recitals, it was witnessed, that in consideration of the sum of 258,629*l.* 10*s.* 6*d.* agreed to be paid by the defendants, the plaintiff undertook to complete the said railway from a certain point in the borough of Leicester to its junction with the Birmingham Railway at Rugby. The declaration contains an averment, that, after the making of that first deed of covenant, and during the progress of the works under it, by a second indenture of covenant, dated the 25th of March, 1839, after reciting, amongst other things, that the defendants were desirous that the permanent way should be completed on or before the 1st of June, 1840, so that the railway might be opened for the use of the public on that day, and that the plaintiff had agreed to expedite the last-mentioned work, and also to lay and complete the permanent line of railway, so that the whole line of railway might be opened to the public on the 1st of

(a) The question was also argued, whether, assuming the due supply of the rails to be a condition precedent, the failure of it could be gone into on these pleadings. The following cases were cited: *Collins v. Gibbs*, 2 Burr. 899; *Stennell v. Hogg*, 1 Saund. 228 a; *Edge v. Pemberton*, 12 M. & W. 187; *Whitworth v. Hall*, 2 B. & A. 695; *Mellor v.*

Baddeley, 2 C. & M. 675; *Rawlins v. Danvers*, 5 Esp. 38; *Woodham v. Edwards*, 5 A. & E. 771; *The Bishop of Meath v. The Marquess of Winchester*, 3 Bing., N. C., 183; and *Sicklemore v. Thistleton*, 6 M. & S. 9, were cited; but the decision of the Court on the first point renders a report of the argument unnecessary.

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June, 1840, and also to maintain and keep in repair such permanent line of railway for such term as therein mentioned, in consideration of the defendants paying him the further sum of £15,000 as a further consideration for the work in the first contract, and for such expedition and completing the same as aforesaid; then it was witnessed, that, in pursuance of that agreement, he undertook that he, being allowed to make such further side-cuttings and spoil-banks, and being found or provided with such railway bars or rails, chairs, blocks, sleepers, and spikes for temporary and permanent use, as thereafter mentioned, should and would, on or before the 1st of June, 1840, well and substantially, and in a good and workmanlike manner, make and complete in all things the said portion of the said railway in the original contract contracted and agreed to be made by him. The declaration then specifies how the railway was to be completed on or before the 1st of June, and then goes on to set forth certain covenants and agreements by the Company with Mr. Macintosh, that they would supply the different articles, the rails, spikes, chairs, and other materials, on given days and in given proportions; and then the second agreement contains a proviso, which is also set forth in the declaration, which is to this effect, that, in case the defendant should not complete the whole of the railway and works on or before the 1st of June, 1840, so as that the said railway may be capable of being opened by the said Company for the use of the public on that day, the defendant should, on demand, pay to the said Company the sum of £300 for the 1st of June, and a like sum for every succeeding day, Sundays only excepted, until the whole of the said railway should have been completed and delivered over to the said Company, capable of being opened by them. The declaration then proceeded generally to aver, that Macintosh complied with the covenants which it was incumbent on him to comply with; and that the defendants had not paid him the money. To this declaration, the fifth plea

of the defendants, which is pleaded only as to £7500, part of the sum demanded, states, in substance, that the plaintiff did not complete the railway on the 1st of June, 1840, according to the terms of the second indenture; and that, in consequence of his failing to do so for the space of twenty-four days, exclusive of Sundays, the defendants had the right of deducting from the sum to be paid to him certain sums, amounting altogether to the sum of £7500. The replication to the plea denies only that the plaintiff was liable to pay in manner and form, as in the plea is alleged. The question is, what is the issue thereby raised? The Lord Chief Baron, at the trial, thought that the defendants were bound, as a condition precedent to their right of deducting part of the sum of £15,000, to furnish the plaintiff with the materials stipulated for in the manner and at the time mentioned in the second indenture; and that, as they had not done so, (which question the jury had found for the plaintiff), the failure of the plaintiff to complete on the 1st of June, 1840, did not make him liable to the deductions on which the defendants insisted: but, after fully considering this question, we think, that the true construction of the deed, and the true question raised by the pleadings, is only whether the railway was completed on the 1st of June, 1840; and that, if not so completed, the plaintiff became liable to allow the daily deduction of £300 for the non-completion; and that the fifth plea was, in truth, made out, if the number of days for which the deduction was claimed, was established. The covenant on the plaintiff's part is absolute, to complete on a given day, or to pay £300 a-day if he does not. Any other construction would lead to this conclusion, which we think an unreasonable one, that the non-supply of a single rail or chair at the time specified for its delivery, although, in the result, wholly immaterial to the facilities for completion, would entitle the plaintiff to receive the £15,000 given as expedition money, without his giving the expedition for it. On the other

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hand, by treating the covenants as independent, it is open to the plaintiff, if he has really been prevented from completing the railway in due time by the defendants' neglect, to bring his action against them for that breach of their covenant. In such an action, it would be open to the jury to give a full redress for all the damages, including those deductions caused by the defendants' neglect, which the plaintiff may have sustained; and, in this way, equal justice would be done to both parties. On the whole, we have come to the conclusion, that this is the proper construction to be put on the covenant in the second indenture, and that this is the issue raised on the replication to the fifth plea; and we think, therefore, that there ought to be a new trial.

Rule absolute.

COURT OF COMMON PLEAS.

In Michaelmas Term, 1845.

Nov. 21st.

TEMPEST v. KILNER.

ASSUMPSIT.—The declaration stated, that, on the 18th of July, 1844, the plaintiff, at the request of the defendant, Railway shares, though an interest in a partnership, and not assignable at law, may be the subject of a valid contract which may be sued on at law.

In assumpsit for not delivering railway shares pursuant to a contract, the plaintiff in his declaration averred, "that he had always from the time of making the agreement been ready and willing to accept the transfer of the shares," and that although, after the lapse of a reasonable time for the transfer, he requested the defendant to transfer the shares, and tendered and offered to pay for them, the defendant did not transfer, &c. Plea, that the plaintiff was not always from the time of making the agreement ready and willing to accept the transfer, &c. :—*Held*, on special demurrer, that the allegation of time in the declaration being divisible, the traverse was too large, and the plea bad.

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bargained and agreed to buy of the defendant, and the defendant then bargained and agreed to sell to the plaintiff, a certain interest or share of him, the defendant, in a certain Company or partnership, undertaken for constructing a railway from the parish of Ashton-under-Lyne, near Manchester, in the county of Lancaster, to the parish of Kirkheaton, near Huddersfield, in the county of York, to wit, one hundred shares in the said Company or partnership undertaking, at a certain price in that behalf, to wit, 15*s.* premium for each and every share, that is to say, 15*s.* for each and every share, in addition to such sum or sums as at the time of the transfer by the defendant to the plaintiff should have been paid to the said Company or partnership in respect of the said shares, and each of them; that on &c., last aforesaid, in consideration thereof, and that the plaintiff, at the request of the defendant, then promised the defendant to accept, *within a reasonable time*, a transfer of the said interest or shares, and to pay for the same at the rate or price aforesaid, the defendant then promised the plaintiff, *within a reasonable time*, to transfer the said interest or shares to him the plaintiff; that, although a reasonable time for the said transfer of the said interest or shares had long elapsed before the commencement of the suit, and the defendant, long before the commencement of the suit, and after a reasonable time from the making of the said agreement and promise had elapsed, could, and might, and ought to have transferred the same to the plaintiff upon payment of the price thereof after the rate aforesaid; and although the plaintiff had always from the said time of the making of the said agreement and promise, been ready and willing to accept the said transfer of the said interest or shares of him the defendant, and to pay for the same at and after the rate in that behalf aforesaid, whereof the defendant during all the time aforesaid had notice; and although the plaintiff, after the lapse of a reasonable time for the transfer of the said interest or shares of the defendant, to wit, on the 1st

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of November, 1844, requested the defendant to transfer the said interest or shares to him the plaintiff, and then tendered and offered to pay for the same, at and after the rate in that behalf aforesaid, yet the defendant did not, no would, when so requested as aforesaid, transfer, and had not up to that time transferred to the plaintiff the said interest or shares of him, the defendant, in the said Company or partnership undertaking, but had neglected and refused so to do; and that, by reason thereof, the plaintiff had lost divers great gains and profits, which might and otherwise would have accrued to him from the transfer of the said interest or shares to him, as aforesaid, &c. Plea: that the plaintiff *was not always, from the time of the making of the said agreement and promise in the declaration mentioned, ready and willing to accept the transfer of the said interest and shares of him, the defendant, and to pay for the same at and after the rate in the declaration in that behalf mentioned, modo et formâ, &c.* : concluding to the country.

Special demurrer, assigning for causes, that the plea neither confesses and avoids the matters contained in the declaration, nor takes issue upon any allegation which is material and decisive as to the right of action of the plaintiff; that the traverse taken by the plea is too large, by reason that it was the duty of the plaintiff, according to the terms of the promise stated in the declaration, to be ready and willing to accept and pay for the said transfer of the said shares or interest, only within a reasonable time, and not at all times, from the making of the contract until the commencement of the action, nevertheless the defendant has tendered such an issue, that, if it appeared at the trial that the plaintiff was not ready and willing at any time whatever from the making of the contract until the commencement of the action, the issue must be found for the defendant; and that the allegation upon which issue is tendered by the said plea, is wholly immaterial to the cause of action stated in the declaration, &c.

Byles, Serjt., in support of the demurrer.—The traverse taken by the plea is too large; the contract being to deliver the shares within a reasonable time, it was the plaintiff's duty to be ready and willing to accept them within that time, and no longer; but, as the issue stands, if the defendant offered, and the plaintiff refused the shares at any time, however long, after the contract was open, (and the declaration alleges that a reasonable time had elapsed long before the commencement of the writ), the defendant would succeed upon the issue: *Basan v. Arnold* (a); Com. Dig. "Pleader," (G. 15); Stephen on Pleading, 286, (4th edit.); *Thurman v. Wild* (b). Then it is clearly no justification for the defendant taking too large a traverse, that the allegation in the declaration is too large also, where the allegation relates to an interval of time which is divisible; though it is otherwise as to an estate in land, or other matter which is not divisible. This allegation being divisible, the defendant should have divided it, and traversed only the material part of it: *Rawson v. Johnson* (c), *Jackson v. Allaway* (d), *Boyd v. Lett* (e).

Manning, Serjt., contra.—If an averment be traversed, though immaterial, it must be proved, unless it is also impertinent: *Bristow v. Wright* (f). The distinction is between immaterial and impertinent averments, or what may be rejected as surplusage and what cannot. Here the allegation is entire and indivisible, and therefore properly traversed in its terms.

But the subject of this contract being railway shares, that is, an interest in a partnership, a mere *chose in action*, they are not properly assignable, not being the subject of legal sale or transfer. [*Maule*, J.—Not so as to enable a partner to sue at law, but there is no illegality in the transfer. The

(a) 6 M. & W. 559.

(b) 11 A. & E. 453.

(c) 1 East, 203.

(d) 6 M. & G. 942.

(e) 1 C. B. R. 222.

(f) 2 Doug. 664.

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law takes notice that these shares, like other interests in a partnership, are things of value, which may be the subject of a valid contract.]

Byles, Serjt., in reply, was stopped by the Court.

TINDAL, C. J.—These shares are the very things which the plaintiff intended to buy and the defendant to sell. How can he say they are not saleable, if there is nothing illegal in the transaction? As to the allegation in the declaration, that the plaintiff had always, from the time of making the agreement, been ready and willing to accept the transfer, I think it is a divisible averment, and that the defendant should have divided it in his plea. It must be taken with such reservation as the law imposes, namely, during such time as, from the nature of the contract, would be reasonable. The declaration, therefore, is sufficient, and the plea bad, and the plaintiff is entitled to judgment.

COLTMAN and ERLE, Js., concurred.

MAULE, J.—I agree that the declaration is clearly good, and the plea bad. I have no doubt that the allegation of time is divisible; and that being so, the defendant has traversed that which is immaterial.

Judgment for the plaintiff.

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COURT OF QUEEN'S BENCH.

In Trinity Vacation, 1846.

THE QUEEN v. The HULL DOCK COMPANY.

June 27.

IN Easter Term, *Kelly* obtained a rule nisi calling upon William Jubb to shew cause why a certiorari should not issue to the clerk of the peace of the borough of Kingston-upon-Hull, to remove into this Court an inquisition taken before the coroner of that borough, under the 7 & 8 Vict. c. ciii (a), for the purpose of inquiring of, assessing, and

By an act, 7 & 8 Vict. c. ciii, a Company were empowered, by s. 79, to agree with the owners of certain lands, &c., including a brewery, for the purchase

thereof. Sect. 83 provides, that the owners of such lands, in addition to compensation for their value, shall be entitled to and may accept compensation for damage by reason of the severing or dividing of such lands, or otherwise. Sect. 106 provides, that, in case of difference between the Company and the owner of any lands taken, required for, or injuriously affected by the execution of the works authorised by the act, as to the value or compensation, the amount shall be settled by a jury. Sect. 117 provides, that such jury shall deliver their verdict for the sum of money to be paid for the purchase of the lands, and for the injury done to the lands of the party by their severance from the lands required by the Company, and also the sum to be paid by way of compensation for the damage occasioned to any such lands by the execution of the works, whether sustained before the injury or for future damage temporary or permanent: the sum to be paid for the injury by severance, or as compensation for such damage, to be assessed separately from the value of the lands.

Held, that, under this act, a jury were justified in assessing compensation as follows:—"£400 for the purchase of the claimant's interest in the brewery, and £300 for the damage which he will sustain by reason of his having to give up his premises as a brewer until he can obtain suitable premises in which to carry on his business."

A clause in such an act taking away the certiorari does not apply to the case of proceedings which operate upon something not within the act, though some part may be within it.

(a) By sect. 79 of the above-named act, the Company are empowered to agree with the owners of the lands described in the plans (which included the brewery and premises of Jubb) for the purchase of such lands.

Sect. 83 provides, that the owners of such lands, in addition to compensation for the value of such lands, shall be entitled to, and may accept, compensation for any damage by them sustained by reason of the severing or di-

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determining the sum of money to be paid to the said William Jubb by the Dock Company at Kingston-upon-

viding of such lands, or otherwise owing to the exercise of the powers of this act.

Sect. 100 provides for the entrance of the Company upon the lands for the purpose of surveying them before payment of the price, making compensation for any damage thereby occasioned to the owners or occupiers of such lands.

By sect. 103 it is enacted, "that the Company shall, by notice in writing, state that the Company are willing to treat for the purchase of the interest of the party in such lands, and as to the compensation to be made for the damage that may be sustained by him by the making of the said docks and works hereby authorised."

Sect. 104. "If for one month after the receipt of such notice such party and the Company shall differ as to the amount of the compensation to be paid to such party for any such interest, or for any damage that may be sustained by him by reason of the execution of the works hereby authorised, the amount of such compensation shall be settled as hereinafter provided."

Sect. 106 enacts, "That if any difference shall arise, or if no agreement can be come to between the owners of any lands or of any interest in any such lands taken, or required for or injuriously affected by the execution of the works hereby authorised, as to the

value of such lands, or of any interest therein, or as to the compensation to be made in respect thereof; or if any such difference arise as to the amount of the damage occasioned to any lands by the temporary occupation thereof in the making of the said works, or otherwise in exercise of the powers given by this act, and for which any party may be entitled to demand compensation according to the provisions of this act, the amount of the compensation to be paid by the Company in every such case shall be settled by the verdict of a jury in manner hereinafter mentioned."

By sect. 108, the Company are to give notice of their intention to cause a jury to be summoned, and in such notice shall state what sum of money they are willing to give such party for his interest in such lands, and for the damage to be sustained by him by the execution of the works thereby authorised.

The 117th sect. enacts, "That such jury shall deliver their verdict for the sum of money to be paid for the purchase of the lands required for the works hereby authorised, or of any interest therein belonging to the party with whom such question of disputed compensation shall so have arisen, and also the sum of money to be paid for the injury done to the lands of any such party by the severance of such lands from the lands required by the Com-

Hull, for the purchase of his interest in a certain warehouse and yard, situate in Church Street, &c., with the appurtenances, and also the sum of money to be paid to him by the said Company for any damage by him sustained in the execution by the said Company of the several works by the said act authorised.

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He moved upon affidavits, which stated, that, on the 13th of September, 1845, the Company, being desirous of purchasing the brewery and premises in question, for the execution of the docks and works authorised by their act, served a notice in writing (under sect. 103) upon Jubb, the owner, stating the particulars of the land and premises required, and as to the compensation to be made for the damage that might be sustained (if any) by him, by reason of the making of the said docks and works. No agreement having been come to, the Company, on the 29th of October, 1845, under sect. 108, served another notice upon Jubb, stating that they were willing to give for his interest in the brewhouse and yard mentioned in the notice of the 13th of September, and for the damage to be sustained by him in the execution of the works, by the said act of Parliament authorised, the sum of £460; and that, if the same was not accepted, it was their intention, after the expiration of a month, to issue their warrant for a jury, as by sect. 110 they were entitled to do. This offer not being accepted,

pany, and also the sum of money to be paid by way of compensation for the damage occasioned to any such lands by the execution of the works, whether it be for damage sustained before the time of the inquiry, or for future damage, either temporary or permanent, or for any recurring damage of which the cause is then only in part obviated, and which cannot or will not be further obviated by the Company; and the sums of

money to be paid for the injury done by any such severance as aforesaid, or by way of compensation for any such damage as aforesaid, shall in every case be assessed separately from the value of the lands or the sum to be paid for the purchase thereof, or of any interest therein."

Sect. 289 enacts, that no proceeding in pursuance of the act shall be removed by certiorari.

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they accordingly issued their warrant to the coroner, (the sheriff being a proprietor in the Company, and therefore interested,) requiring him to summon a jury to meet at a certain time and place, then and there to inquire of, assess, and determine, by their verdict in that behalf, the sum of money to be paid for the purchase of the interest of William Jubb in a certain brewhouse, &c., and also the sum of money to be paid to him for any damage by him sustained by the execution of the works aforesaid. A jury was summoned accordingly.

At the inquisition, evidence was tendered on behalf of Jubb, to shew the damage he would sustain by the loss of his business. This evidence was objected to by the counsel for the Company, but received by the coroner, who directed the jury to assess the damages separately; which they did, as follows:—

“The jurors assess the compensation to be paid by the said Company to the said William Jubb as follows, that is to say, the sum of £400 for the purchase of the interest of him, the said William Jubb, in the brewhouse, yard, and premises aforesaid, with the appurtenances, and all the bricks and buildings connected therewith; and the further sum of £300, as compensation for the damage, loss, and injury which he, the said William Jubb, will sustain by reason of his having to give up his business as a brewer, until he can find suitable premises in which to carry on his said business of brewer.”

Watson and Henderson shewed cause (a).—1. By section 289 it is enacted, that no proceeding in pursuance of the act shall be removed by certiorari. The certiorari, therefore, can only issue where there is a total absence of jurisdiction; so that these proceedings cannot be removed even if the latter finding of the jury exceed their province: *Res*

(a) May 4th, before Lord Denman, C. J., *Patteson, Williams, and Coleridge, Js.*

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v. *The Justices of the West Riding of Yorkshire* (a). [Lord Denman, C. J.—We thought that application only a mode of asking for a new trial. The certiorari is not taken away when the proceeding operates upon something not within the act; parties are not to put themselves out of the reach of the Court by inserting something in their proceedings which is within the jurisdiction of their act.] This is substantially an attempt to review the verdict of the jury on the ground of the damages being excessive. If they had given the whole £700 as the value of the premises, there could have been no way of impeaching their verdict; and they might well have done this, as the value of the premises was founded, in a great measure, on their eligibility for the purposes of the particular business carried on in them; and the finding in this particular is within the terms and scope of the 83rd, 103rd, 104th, and 117th sections, the provisions of which last, as to how the verdict is to be entered, are only directory: *Regina v. The Trustees of Swansea Harbour* (b). They cited also *Regina v. The Sheffield, Ashton-under-Lyne, and Manchester Railway Company* (c), and *Regina v. The Bristol and Exeter Railway Company* (d), as to the effect of the clause taking away the certiorari.

Sir F. Kelly, Solicitor-General, and Archbold, contra.—The certiorari is not taken away, for part of these proceedings were clearly out of the jurisdiction of the jury: *Rex v. The Justices of Somersetshire* (e), *Rex v. The Justices of Kent* (f). The jury had no right to assess future damages for the injury to the business: *Lee v. Milner* (g). The 117th section distinctly specifies the matters for which com-

(a) 1 A. & E. 563.

(b) 8 A. & E. 439.

(c) Ante, Vol. 2, p. 522; 11 A. & E. 194.

(d) Ante, Vol. 2, p. 99; 11

A. & E. 202, n.

(e) 5 B. & C. 816.

(f) 10 B. & C. 477.

(g) 2 M. & W. 824.

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pensation is to be given, and does not mention loss of trade, which it would have done, if the Legislature intended it should be the subject of compensation. And it is impossible to separate the part of the finding which is within their jurisdiction from that which was not within it.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.—This was an application for a certiorari to remove into this Court an inquisition taken under the Hull Dock Act, 7 & 8 Vict. c. ciii, for the purpose of assessing the sum of money to be paid to William Jubb for the purchase of his interest in a brewhouse and yard proposed to be taken by the Company for the purposes of their act, and for any damage by him sustained by the execution of the works by the act authorised. The jury assessed that £400 was to be paid to William Jubb, for the purchase of his interest in the premises, and the further sum of £300 as compensation for the damage, loss, and injury which he would sustain by reason of his having to give up his business as a brewer until he could find suitable premises in which to carry on his said business of brewer.

The question in this case turns upon the true construction of the Hull Dock Act; and, although several clauses were referred to in the course of the argument, it was at length agreed that the 117th is the material section; that is in these terms: "The jury shall deliver their verdict for the sum of money to be paid for the purchase of the lands required for the works hereby authorised, or of any interest therein, &c., and also the sum of money to be paid for severance, &c., and also the sum of money to be paid by way of compensation for the damage occasioned to any such lands by the execution of the works, whether it be for damage sustained before the time of the inquiry, or for future damage, either temporary or permanent, or for any recurring damage, &c.:

and the sums of money to be paid for the injury done by such severance as aforesaid, or by way of compensation for any such damage as aforesaid, shall in every case be assessed separately from the value of the lands, or the sum to be paid for the purchase thereof, or of any interest therein." And the question is, (as it was throughout the argument properly assumed to be,) whether it was competent for the jury, under this clause, to award the latter sum of £300 for the kind of injury alleged to have been sustained; because, in this stage of the proceedings, it must be assumed that there was sufficient proof of such injury, and it is certain that damage to the amount awarded may have been sustained by the interruption or breaking up of such a trade, and that, therefore, it must be considered *à priori* a reasonable subject for compensation.

The difficulty in this case arises from the language of the latter branch of this clause, under which alone this species of compensation can be given, the former part expressly relating to the purchase of land, (meaning in this act any kind of property), and to "the money to be paid for the injury to the lands of any such party, (meaning, of course, the party interested), by the severance of such lands." Then follows the third branch of inquiry, "and also the sum of money to be paid by way of compensation for the damage occasioned to any such lands," not to the owner of or party interested in such lands, nor is such owner or party mentioned or designated, except by implication arising from the expression, "sum of money to be paid," which can only mean to the owner or party interested. That such must have been the meaning, and that the words "owner or party interested" have been accidentally omitted, or are to be considered as understood, seems tolerably clear from this, that any injury to property as unconnected with an owner is unmeaning and absurd; and in this very act such is the form of expression generally used. In sect. 100, "making compensation for any damage thereby occasioned to the

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owners or occupiers of such land," is the language; in sect. 103, "damage sustained by him (the party interested) by making the docks;" and again, in sect. 104, "compensation for any injury that may be sustained by him by reason of the execution of the works." To this may be added, that, in sect. 106, wherein mention is first made of having recourse to a jury, in the event of certain other modes of adjustment having failed, that jury is to assess "the amount of the compensation to be paid by the Company;" and it is to be observed, that "compensation" is mentioned without any limitation or restriction, and must be understood as meaning remuneration or satisfaction for injury or damage of every description. If, then, the words "damage occasioned to any such lands" may be considered as virtually incorporating "owner of or party interested in" any such lands, the rest, we think, is quite clear, because we have no doubt but that the expressions, "damage before the inquiry, and future damage, temporary or permanent," are large enough to sustain the finding of the jury as to the latter sum of £300; and upon the whole, in a case where we see no reason to doubt that substantial justice has been done, we are of opinion, that, without any excessive and unauthorised violence of construction, we may read the latter part of the clause in question in the manner above suggested.

We do not think that the cases cited have any very material bearing upon the present. In the case of the Aire and Calder Navigation Company, *Rex v. The Justices of the West Riding of Yorkshire* (a), which is, perhaps, the nearest, and in which the jury had found, "present damage, 0, future damage £2600," this Court refused a mandamus, directing the sessions to enter a verdict in a particular manner; because they held that course to be getting rid, by a side wind, of clauses in an act of Parliament, by which a

(a) 1 A. & E. 563.

certiorari was expressly taken away. There was no decision upon the finding of the jury. In the case of *Lee v. Milner* (a), indeed, the Court of Exchequer did hold, that the finding of the future damages could not be sustained; upon the ground, that, in the absence of any actual and present damage, such finding must needs be uncertain and wild speculation. Supposing, however, that decision to be quite correct, it does not affect this case, because here the jury have sure grounds for ascertaining the amount of damage. In the case of *Rex v. The London Dock Company* (b), this Court held, that the tenant of a public house, whose custom had been affected by the cutting off of communication by reason of the works of the Company, was not entitled to compensation; but, in that case, no part of the premises had been taken or touched by the Company. The other cases cited respect the power of this Court, and its right of interference when inferior courts exceed their jurisdiction, wholly or partially; a subject into which it is not needful for us in this case to enter. Upon the whole, we are of opinion that the rule must be discharged.

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Rule discharged.

(a) 2 M. & W. 824.

(b) 5 A. & E. 163.

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AFFIDAVIT.

WHERE an application had been made for the costs of a mandamus, upon an affidavit, intituled *The Queen v. The Directors of the Great Western Railway Company*, instead of *The Queen v. The Great Western Railway Company*, (their name of incorporation), the same mistake occurring in the body of the affidavit, and the rule was discharged on that ground, the Court refused a second application made upon the same affidavit amended in this particular, the amendment being required in the body of the affidavit, and not merely in the title or jurat. *The Queen v. Great Western Railway Co.*, 700

AGREEMENT.

1. An owner of land severed by a railway claimed compensation from the Company; the question was submitted to a jury, who awarded to him compensation, on the footing that there was to be a total separation of his land without any communication being made, and he received the payment as such compensation:—*Held*, that this was an *arrangement* with the Company under sect. 111 of their Act (6 & 7 Will. 4, c. cvi.); and

that the owner of the land, afterwards crossing the railway for the purpose of the occupation of his land, was a trespasser within the 3 & 4 Vict. c. 97, s. 16; and that, as it was proved that the verdict of the jury had never been recorded under section 31, parol evidence of it, and of the grounds on which it proceeded, was admissible. *Manning v. Eastern Counties Railway Co.*, 637

2. By an Act (11 Geo. 4 & 1 Will. 4, c. lxix, ss. 1, 2, 3), certain trustees were created for the purpose of building a bridge.

Sect. 85 provided, that persons who should agree to give or lend any money towards carrying the act into execution should pay the same to the treasurer of the said trustees, as the trustees should order and direct; and, if any person should neglect or refuse to pay, the trustees might sue for and recover the same in the name of their treasurer by action of debt or on the case.

In an action against a defendant, who had agreed to lend the trustees £25, for non-payment of calls—*Held*, 1st. That an agreement to lend the £25 might be inferred from a paper signed by the defendant, which referred to an engagement to subscribe a certain sum therein set against his

name, coupled with proof of payment by him of an earlier call corresponding to that on £25, and of his taking a receipt for a call on a loan of that sum; and that such agreement was not within sect. 4 of the Statute of Frauds (29 Car. 2, c. 4), though a prospectus had previously issued stating that the whole sum would not be (nor was it) called for within a year.

2nd. That the action on an agreement to give or lend might be brought either in debt or case. *Miles v. Bough*, 668

3. Where an agreement has been commenced by letter, but in the course of the treaty an offer, made by letter, has been verbally rejected:—*Held*, that the party who has made the offer is relieved from his liability unless he consent to renew the treaty. The party who has rejected the offer cannot afterwards at his own option convert the same offer into an agreement by acceptance, without a renewed offer from the other party. *Sheffield Canal Co. v. Sheffield and Rotherham Railway Co.*, 121

4. A Railway Company applied by motion, under one of their acts, for an order of reference to tax a bill of costs sent in by the solicitor of a person of whom the Company had purchased land.

It appearing that a special agreement existed between the parties, the Court refused the motion with costs, on the ground that it had not, on an application of this sort, an opportunity of considering, whether, under the terms of the agreement, the question of costs was or was not within the jurisdiction of the Court. *Ex parte The Great Western Railway Co., re Rhodes*, 516

5. An agreement under seal, entered into between the projectors of a Railway Company, S. and others, and Lord H., a peer of Parliament,

recited the formation of the Company, and that S. and others were projectors, and that a bill had been introduced into Parliament for making the railway, the line whereof would pass through the estates, and near the residence of Lord H., who, considering this would be an injury to him, intended to oppose the passing of the bill: and that the projectors had proposed to Lord H., if he would withdraw his opposition to the bill, and assent to the railway, they would endeavour to deviate the line proposed. Lord H. agreed that, on condition of the agreements thereafter contained being performed, he would withdraw his opposition, and give his assent to the bill; and they then covenanted, (inter alia), in case the bill should be passed in the then next session, to pay to Lord H. £5000, as compensation for the above injury, within six months after the bill should receive the royal assent.

Lord H. accordingly withdrew his opposition, and the bill passed in that session. Six months after, he brought an action of debt for the £5000. The declaration stated the above facts, and it was pleaded that the railway was intended to pass through the lands of other individuals, and that the agreement was entered into secretly between the parties, without the knowledge of those landowners, and was concealed from them and from the legislature until the act passed, and that Lord H. was a peer of the realm and a lord of Parliament:—

Held, (affirming the judgment of the Exchequer Chamber), that the agreement was valid, and that a member of the legislature may make terms for the sale of his land, and compensation for injury to his comforts and property, it not appearing by the record, that the money was promised as a consideration for his vote, or that the parties meant to conceal it from

the landowners or from the legislature, or that any fraud was intended. *Simpson v. Lord Howden*, 294

6. By a Railway Act, 6 & 7 Will. 4, c. lxxx, a Company was required to make proper watering-places for cattle in all cases where, by means of the railway, the cattle of any persons occupying lands adjacent thereto should be deprived of access to their ancient watering-places, and to supply the same with water. After the act passed, by indenture made between the Company and Sir W. M., in consideration of the latter's withdrawing his opposition to the progress through Parliament of a bill to amend that act, the Company covenanted to pay to Sir W. M., as and for the special damage to be thereby occasioned to his estate, and particularly to his mansion-house, the sum of £5000; and that whenever any close of his should be intersected by the railway, the different parts adjoining should be thrown together and properly levelled, &c., and that the Company should at their own expense make and complete such good and sufficient fences, drains, gates, stiles, and other *conveniences* as might be necessary for the re-dividing of the fields which might be intersected by the railway, and for laying them to the adjoining fields of the same estates for the purpose of convenient occupation; or otherwise would pay to Sir W. M. the costs incurred by him in so doing. The £5000 was paid by the Company.

A mandamus issued reciting the above acts, and suggesting that the Company had made their railway through and intersected eight closes of Sir W. M., in which there were ponds or watering-places for cattle, so as to cut off the ponds from one portion of the closes respectively; and that application had been made by him, Sir W. M., to the Company,

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but refused. The writ therefore commanded the Company to make proper watering-places for cattle in such portions respectively of the said several closes.

The return to the writ stated the indenture, and a notice under it by Sir W. M. that he required the Company to make, amongst other conveniences, the ponds in question; that they executed the works except the ponds, alleging that the cutting off the ponds was part of the damage covered by the £5000, and also that ponds were not conveniences within the meaning of the indenture.

Traverse of both these assertions, and demurrer to the traverse.

The Court of Queen's Bench *held*, that the indenture furnished no sufficient answer; that, even if the ponds could be included in the word "*conveniences*," they were not intended to be provided for by the £5000. A peremptory mandamus was therefore issued.

But *held*, by the Court of Exchequer Chamber (reversing the award of the peremptory mandamus by the Court of Queen's Bench), that the writ was bad, as it ordered the Company to do more than the act required, namely to make a pond in each of the portions of the closes, there being nothing to shew that one watering-place would not have been sufficient for all the portions. *The Queen v. The York and North Midland Railway Co.*, 764

7. A rule nisi having been obtained for a mandamus to a Railway Company to summon a jury to assess compensation for damage under their act, the following agreement was entered into by their agent and the claimant: "We do hereby agree to accept of the Company, in discharge of our claim against them for injury, &c., the sum of £426, and £8 per week for the future, as long as the

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present damages continue. (Signed) W. E., T. E." This was also signed by the agent of the Company. Upon this agreement the proceedings for the mandamus were discontinued. The Company paid the £425, and also the £8 per week for several weeks, and then ceased, whereupon an application was made for a mandamus to them to pay the money according to the agreement, or to summon a jury to assess compensation, or to revive the former rule :—

Held, that, as the agreement was not under the seal of the Company, it could not be enforced by action; and the Court granted the mandamus. *The Queen v. The Bristol and Exeter Railway Co.*, 777

ATTORNEY, APPOINTMENT OF.

See CASES, 3.

AWARD.

The plaintiffs, being obliged, in order to carry out the purposes of their act, to cross the defendants' railway, and having, under their original act, only a power to cross with the consent of the defendants, applied to Parliament for another act to enable them to build a bridge over the defendants' railway without such consent. The second act gave the plaintiffs power to build such bridge, provided that the width between the abutments thereof should not be less than twenty-six feet, measuring the same in a line at right angles to the defendants' railway, and that no part of the under side of the soffit of the bridge should come within sixteen feet of the surface of defendants' railway; and provided that such bridge should be constructed of such materials and in such manner as should be agreed upon between plaintiffs' engineer and the engineer of the defendants' rail-

way: and in case the defendants' engineer should not, within three weeks after the plaintiffs' engineer should have submitted to him a plan of the proposed bridge, signify his assent thereto, then it should be referred to the surveyor of bridges for the county, whose decision should be binding and conclusive on all parties.

The defendants' engineer not having given his assent to the plan submitted by the plaintiffs' engineer within three weeks, the plaintiffs submitted their plan to the county surveyor, who made his award, with a plan, from which it appeared that the abutments of the proposed bridge must necessarily rest on the defendants' land on each side of their rails.

The defendants prevented the plaintiffs from building their bridge according to this plan, whereupon they purchased land upon which to build the abutments, and submitted a new plan to the defendants' engineer. No notice having been taken of this new plan, the plaintiffs referred it to the county surveyor, and a day was fixed for proceeding on the reference. The defendants did not attend the reference, but built up walls which rendered it impossible for the plaintiffs to erect their bridge; whereupon they filed a bill, praying an injunction which would, in effect, be mandatory, and compel the defendants to pull down their walls, and withdraw all obstructions to the plaintiffs' proceeding in their works.

On a case sent for their opinion, the Court of Exchequer decided as follows :—

1st. That the plaintiffs had no right, without the consent of the defendants, to construct the bridge according to the first award of the county surveyor. 2nd. That, as he had no power to direct a bridge to be built upon land without the consent of the owner, his first award was not binding, and he

was at liberty to make another. 3rd. That the abandonment by the plaintiffs of the first award did not operate as a release of their right to build a bridge over the railway. 4th. That they had a right to place temporary scaffolding, &c. on the land of the defendants, if necessary for the construction of the bridge.

A Court of law having decided the legal right in favour of the plaintiffs, the Vice-Chancellor accordingly granted the injunction sought by the bill, with a proviso, that it should be exercised *bonâ fide*, and so as not at any time or in any manner to obstruct or interfere with the traffic of the railway. *The Great North of England, Clarence, and Hartlepool Junction Railway Co. v. The Clarence Railway Co.*, 605

BRIDGE.—BRIDGE ACT.

See AGREEMENT, 2.

AWARD.

COMPANY, 3.

HIGHWAYS, 1.

INJUNCTION, 1, 2.

By a Railway Act (6 & 7 W. 4, c. cvi, s. 9) a Company were empowered to raise or lower any roads or ways in order the more conveniently to carry the same over or under or by the side of the railway. By sect. 100, where any bridge should be erected by the Company over any public carriage road, not being a turnpike road, the centre of the arch must be of a height from the surface of the road of not less than 16 feet. By sect. 120, nothing in that act is to derogate from any of the rights or privileges of any parish over which the railway shall pass, acting under any local act.

By a local Paving Act (12 Geo. 3, c. xxxviii) it was enacted, "That no person shall alter the form of any pavements which shall be now made

by virtue of this act, without the consent of the commissioners, or in any wise encroach thereon, or put up any posts, boards," &c.

Held,—That the Company were entitled, in carrying the railway by a bridge over a street under the control of the commissioners, to lower the street so as to give the height to the centre of the arch required by the statute. *The Queen v. The Eastern Counties Railway Co.*, 22

BYE LAWS.

By a Local Act (9 Geo. 3, c. lxxi, s. 37) the Company were empowered to make bye-laws for the good government of the Company, and for the good and orderly using the navigation, and also for the well-governing of the bargemen, watermen, and boatmen, who should carry any goods, wares, or merchandise upon any part of the said navigation, and to impose and inflict such reasonable fines or forfeitures upon all persons offending against the same, as to the major part of the Company should seem meet, not exceeding 5*l.*:—*Held*, that this power did not authorize the Company to make a bye-law that the navigation should be closed on every Sunday throughout the year, and that no business should be transacted thereon during such time, (works of necessity only excepted), nor should any person during such time navigate any boat, &c., nor should any boat, &c. pass along any part of the said navigation on any Sunday, except for a reasonable distance for the purpose of mooring the same, and except on some extraordinary necessity, or for the purpose of going to, or returning from any place of divine worship, under a penalty of £5; and that such bye-law was illegal and void. *The Calder and Hebble Navigation Co. v. Pilling and Others*, 735

G G G 2

CALLS.

See COMPANY, 1, 3.

1. By a Railway Act (6 Will. 4, c. lxxix) it is provided (sect. 129) that all persons who have subscribed, or who shall hereafter subscribe to the undertaking, shall pay such sums as shall from time to time be called for, and that in case of default it shall be lawful for the Company to sue for and to recover the same. Sect. 130 empowers the directors to make calls from the subscribers to and proprietors of the undertaking for the time being, and if any owner or proprietor shall neglect to pay his rateable proportion it shall be lawful for the Company to sue for and recover the same. Sect. 125 provides that the Company shall from time to time enter in a book the names, &c. of the several persons who shall be or become entitled to shares in the undertaking, and shall deliver a certificate thereof to every such proprietor on demand, which shall be evidence of his title to the shares.

A defendant had subscribed the parliamentary contract, but was not registered in the book as a proprietor: —*Held*, that the words “subscriber” and “proprietor” are synonymous in the act, and therefore that the defendant was liable as a *subscriber* in an action brought against him under sect. 129 for calls made on the *proprietors* of the undertaking. *West London Railway Company v. Bernard*, 649

2. By a Railway Act (6 Will. 4, c. lxxvii) the Company are authorised (sect. 95) to sue subscribers who neglect to pay the calls on their shares. Sect. 96 empowers the directors to make calls of money from the subscribers and proprietors for the time being, and, in default of payment, to sue for the calls, or to declare the shares forfeited. Sect. 98 provides, that, in an action against

such proprietor for the time being, it shall be sufficient to declare that the defendant, being a proprietor of a share, is indebted in £— for a call, whereby an action hath accrued to the Company, without setting forth the special matter; and sufficient to prove that the defendant, at the time of making such call, was a proprietor of a share, and that the call was made, and notice given as directed by the act. Sect. 101 enables proprietors to sell their shares; providing, that, on every such sale, the deed or conveyance executed by the seller and purchaser shall be kept by the Company, who shall enter in a book a memorial of the transfer, and indorse the entry thereof on the deed, and on the certificate of the share sold; and, until such memorial shall have been made and entered, the seller shall remain liable for calls, and the purchaser shall have no part of the profits, nor interest paid, nor vote in respect of such share. Sect. 102 prohibits the sale by any person of any share on which a call shall have been made after the day appointed for payment of the same, unless at the time of such sale he shall have paid the full sum called for in respect thereof.

In an action for calls, the declaration stated, that the defendant, having before the commencement of the suit been a proprietor of shares, was indebted to the Company for a call on each of such shares, and that, by reason of the calls remaining unpaid, the defendant still is indebted, and an action has accrued to the plaintiffs. Plea, that the call was made payable on —; and that the defendant transferred his shares by deed to one C.T., and that the Company entered a memorial of the transfer, according to the provisions of the act, before the call was payable.—*Verification.* On special demurrer to this plea:—

Held, reversing the judgment of the Court below, that the plea was bad, as being an argumentative denial that the defendant was ever indebted to the Company, and that the declaration was good on general demurrer. *The Aylesbury Railway Company v. Mount*, 469

3. In an action for calls, the defendant applied to set aside the proceedings on the ground that the action had been brought without authority, as the Company had ceased to exist. *Held*,—that as the cause had been set down for trial, and the defendant had known the facts for a long time, the application was, at all events, too late.

And, that as the persons authorizing the action had for some time acted as directors, the validity of their appointment could not be questioned on such an application.

Held, also, that, after plea, it was to be presumed that the attorney had been appointed under the seal of the Company; and the Court refused to allow a plea raising that question to be added at that stage of the proceedings. *Thames Haven Dock and Railway Co. v. Hall*, 441

CARRIERS.

1. The original bill was filed in June, 1843, and plaintiffs thereupon gave a notice of motion, supported by affidavits, for an injunction to restrain the defendants from making certain charges as carriers by railway, which the plaintiffs considered to be illegal. On the 1st of July defendants applied for time to answer the affidavits, and on the 15th their affidavits were filed. On the 6th of September and 23rd of November, plaintiffs filed further affidavits, and on the 19th of December affidavits were filed by the defendants in reply. On the 29th of January plaintiffs opened their case, and on

the 29th of May applied for a day to resume the argument; and the 21st was fixed. A supplemental bill was filed on the 1st of June, and on the 29th the hearing was resumed, and the application was refused by the Vice-Chancellor of England, on the ground of delay, with costs. The Lord Chancellor, on appeal, affirmed the judgment of the Vice-Chancellor, with costs.

Where a party files a bill praying an injunction, and afterwards moves, on affidavit, for an immediate injunction—*Held*, that that can only be granted on the ground that to wait for the decree would be productive of great or unknown mischief to the plaintiffs.

Where a plaintiff does not press on his application, the Court will draw the conclusion that it is not of an urgent nature.

Where an option is given to a party sending packages containing small parcels, to pay according to an average, or to pay for the parcels separately, if the principle of an average be legal, and the amount of it reasonable, although the alternative requiring the party to pay for the separate parcels may be per se illegal, that will not render the demand to pay according to average illegal; and the Court will not grant an injunction until the illegality be established at law.

Whether defendants, being carriers only to Birmingham, can legally make the same charge to A. for the delivery of goods at Birmingham as they make to B. for delivery of goods at Worcester, B. agreeing to give the Company their whole custom, and agreeing to pay on certain articles an increased price—*Quære?* *Pickford v. Grand Junction Railway Co.*, 538

2. By a Railway Act (5 & 6 Will. 4, c. cvii, s. 163) it is enacted, that all persons shall have free liberty to pass along and use the railway with carri-

ages upon payment of certain rates and tolls. By s. 166, the Company are empowered to provide locomotive or other propelling power, and to charge for the use thereof certain additional rates. Sect. 167 authorizes the Company to carry and convey on the railway, passengers, cattle, and goods, and to make reasonable charges for such conveyance, in addition to the rates or tolls by the act authorized. Sect. 174 empowers them from time to time to reduce any of the said rates or tolls, and again to raise them, so as not to exceed the amount authorized by the act; and sect. 175 provides that the aforesaid rates and tolls shall at all times be charged equally and after the same rate per ton per mile throughout the whole of the railway, in respect of the same description of articles, matters, or things; and that no reduction or advance in the said rates or tolls shall, either directly or indirectly, be made partially, or in favour of or against any particular person or Company, or be confined to any particular part of the railway, but shall extend to the whole of the railway, and to all persons whomsoever using the same or carrying the same description of articles, &c. thereon. By a subsequent act, 2 Vict. c. xxvii, a similar provision is made for charges by the said acts authorized to be made for the carriage of passengers, goods, &c., to be conveyed by the Company, or for power and carriages supplied by them.

The Company acted themselves as carriers, charging the public at the rates specified in their printed bills for carriage, including the collection, weighing, loading, unloading, and delivery of the goods. They also carried goods for other carriers, allowing them a certain deduction for the trouble of collection, &c., which was performed by the carriers. In their

dealings with a particular carrier, they refused to make such allowance, but were willing to perform for him all the things which formed the consideration for that allowance, and which, in fact, he performed for himself.

Held, that the Company were not justified in withholding the allowance from such carrier, and, therefore, that the charges to him were not equal or reasonable.

The Company made the following distinction, as to charges for carriage, in their dealings with the public and with carriers. In the case of the public, if there were several packages from one consignor to several consignees, or vice versa, the charge was made upon the aggregate weight: in the case of carriers, if there were several packages consigned by or to different individuals, the charge was upon the separate weight of each package, unless it was known that more than one package belonged to the same sender, or was going to the same consignee, in which case they were charged on the aggregate weight. In all cases of carriers, the Company dealt with and recognised the carriers only as their consignor and consignee of the goods.

Held, that they were bound to treat them so for all purposes, including the mode of charging in the aggregate, and had no right to make a distinction in that respect between them and individuals.

Held, also, that the extra charges which were paid by the plaintiff in both instances might be recovered back in an action for money had and received, being payments not made voluntarily, but in order to induce the Company to do that which they were bound to do without them.

Such acts of Parliament are to be construed strictly against the parties obtaining them, and liberally in fa-

vour of the public. *Parker v. Great Western Railway Co.*, 563

3. By a Railway Act (7 Will. 4 & 1 Vict. c. cxix) a Company were empowered to make a railway, which all persons were to have liberty to use on payment of certain tolls. The Company were also empowered to provide and charge for the use of locomotive engines on the railway, and to use locomotive engines and carriages for the conveyance of passengers, goods, &c., and to charge for such conveyance. Sect. 253 provides that no action or proceeding shall be prosecuted against any person, &c. for anything done or omitted to be done in pursuance of the act, or in the execution of the powers or authorities given by it, without twenty days' notice in writing.

An action was brought against the Company in case for negligence. The declaration stated, that they were owners of the railway and carriages used by them for the conveyance of passengers along it for reward, and, being such owners, the plaintiff, at their request, became a passenger in one of the carriages for reward to them, and they received him as such passenger, and that it became their duty to use due care and skill in conveying him.—Breach, that they did not use due care and skill, but took so little care, and so negligently, &c. conducted themselves in carrying him and managing the carriage in which he was passenger, the train to which it was attached, and the engine by which it was drawn, that the carriage was thrown off the rails, and the plaintiff injured.

Held, that no notice of action was necessary, as the Company were sued only as carriers, and not for anything done or omitted in pursuance of the act; and that, although it was proved that the rails were defective at the place where the accident occurred, so

that the rate at which the train was travelling was hazardous.

Seem, that, in proving that the train and railway were exclusively under the management of the Company when the accident occurred, the plaintiff made out a *prima facie* case of negligence, it being for the defendants to disprove negligence in such a case, rather than for the plaintiff to prove it. *Carpue v. London and Brighton Railway Co.*, 692

4. By the act 3 & 4 W. 4, c. xxxiv, the Grand Junction Railway Company are authorized (s. 156) "to carry and convey upon the railway, all such passengers, goods, &c., as shall be offered to them for that purpose, and to make such *reasonable charges* for such carriage and conveyance as they may from time to time determine upon. Sect. 159 empowers them "from time to time to make such orders for fixing, and by such orders to fix the sums to be charged by them in respect of small parcels (not exceeding 500 lbs. weight each) as to them shall seem proper." By the 4 Will. 4, c. lv, s. 19, the Company are empowered to carry passengers, goods, &c., on other railways, "and to make such *reasonable charges* for such carriage, &c. as they may determine."

The Company, under the powers of the above acts, became carriers of goods for hire between Manchester and London, using for that purpose their own and other railways. They published a list of charges, which divided the "rates by merchandize trains" into seven classes, from 16s. to 60s. per ton. Then followed "Boxes, bales, hampers, or other packages, when they contain parcels, &c., under 112 lbs. weight each, directed, consigned, or intended for different persons, or for more than one person, 1d. per lb. weight."

The plaintiffs caused several small

814 COMMUNICATION.

parcels, each under 112 lbs., intended for different persons, to be packed in a hamper, and tendered to the Company for carriage, offering at the same time to pay at the rate of 60s. per ton for the carriage. The Company refused to carry it on those terms, and demanded 1d. per lb.:—*Held*, that this charge was not a *reasonable* one.

By another act (3 Vict. c. xlix, s. 26) it was provided "that the charges by the recited act (3 & 4 Will. 4, c. xxxiv) authorized to be made for the carriage of passengers, goods, &c., shall be at all times charged *equally*."

Amongst the charges in the above-mentioned list was one for "Manchester packs," 65s. per ton, with a notice at the foot of the list, that "goods were brought to the station at Camden Town without extra charge," and "no charge for booking or delivery in London." The Company made an agreement with C. & H., that the latter should carry from the station, and deliver in London all goods carried by the railway, and should for so doing receive 10s. out of every 65s. per ton:—*Held*, under the circumstances, that the charge of 65s. per ton to a consignee, who was willing to receive the goods at Camden Town, was both *unreasonable* and *unequal*. *Pickford v. Grand Junction Railway Co.*, 193

CERTIFICATE OF JUSTICES.

See COMPENSATION, 3.

CERTIORARI.

See COMPENSATION, 9, 11.

COMMUNICATION.

See AGREEMENT, 1, 6.

COMPANY.

COMPANY.

See INDICTMENT.

SEAL.

TRESPASS.

(*Proceedings of*.)

See AGREEMENT, 1, 2.

BYE LAWS.

1. By the 6 & 7 Will. 4, c. cviii, it is enacted, (s. 108) that the business of the Company shall be carried on under the management of *twelve* directors, to be chosen from time to time from certain qualified proprietors, who shall have the general management, &c., of the business of the Company, the custody of, and power to use their common seal, and to do all things necessary for carrying on the business, to enforce the powers, &c., and to bind the Company, as if the same were done by the whole corporation. By s. 109, nine persons are named as the first directors, and provision is made for their retiring by rotation, and the election of *twelve* new directors. Sect. 112 enacts, that when any vacancy shall occur by death or any other means than by going out of office by s. 109, (i. e. by rotation), it shall be lawful for the remaining directors to elect some other qualified proprietor to be a director. By s. 116, *five* directors are sufficient to constitute "a court of directors." And by s. 123, it is enacted, that if any proprietor neglect to pay his calls, it shall be lawful for the said Company to sue for and recover the same.

In an action brought by the Company against a proprietor for calls, the defendant suffered judgment by default on the 10th of March, and on the 31st of May moved to set aside the judgment, on the ground that there were only *seven directors*; who therefore had no authority to bring an action.

Held, that the objection was at all events too late, and that, if the absence of the full number of directors was an answer to such action, it ought to have been pleaded.

But *semble* that the clause (s. 108), as to the business of the Company being under the management of *twelve* directors, is directory only. *The Thames Haven Dock and Railway Co. v. Rose*, 177

2. Sect. 118 of a Railway Act (6 Will. 4. c. lxxix) enacts, that the proceedings of the meetings shall be entered in a book, and shall be signed by the chairman of such respective meetings, and shall be allowed to be read in evidence in all Courts, &c. :—*Held*, that the signature of the minutes of a previous meeting by the chairman at the subsequent one, in the following form :—“Confirmed, W. G.”, W. G. having been chairman of the previous meeting, was a sufficient compliance with the act. *West London Railway Co. v. Bernard*, 649

3. By an act, (11 Geo. 4 and 1 Will. 4, c. lxix, ss. 1, 2, 3), certain trustees were created for the purpose of building a bridge.

Sect. 5 qualified and disqualified certain persons for trustees, and imposed a penalty on persons elected or appointed trustees acting as such without being qualified or without taking the oath prescribed by sect. 6, but provided that all acts of persons acting as trustees, though not duly qualified, or disqualified, previous to their being convicted of the offence, should be valid.

Sect. 6 gave the form of the oath, and enacted that no person should be capable of acting as a trustee (except in administering the oath) until he should have taken and subscribed it, which oath it should be lawful for any one of the said trustees to administer, and which, so taken and subscribed by each trustee, was to be

entered in the book of their proceedings.

Sect. 11 directed the trustees to keep a book, and to make proper entries therein of the names of the trustees who should attend the meetings, and of all orders and proceedings relative to the execution of the act; and that the chairman of every meeting should subscribe his name at the end of the proceedings of the said trustees at such meeting, and that such book should be admitted in evidence.

Sect. 85 provided, that persons who should agree to give or lend any money towards carrying the act into execution should pay the same to the treasurer of the said trustees, as the trustees should order and direct; and, if any person should neglect or refuse to pay, the trustees might sue for and recover the same in the name of their treasurer by action of debt or on the case.

Sect. 109 enacted, that, in all cases where it might be necessary for the trustees to give any notice under the act, such notice should be in writing or print, and be signed by them or some of the trustees, or by the clerk or clerks for the time being to the said trustees by their order.

In an action against a defendant, who had agreed to lend the trustees £25, for non-payment of calls—*Held*, 1st. That an agreement to lend the £25 might be inferred from a paper signed by the defendant, which referred to an engagement to subscribe a certain sum therein set against his name, coupled with proof of payment by him of an earlier call corresponding to that on £25, and of his taking a receipt for a call on a loan of that sum; and that such agreement was not within sect. 4 of the Statute of Frauds, (29 Car. 2, c. 4), though a prospectus had previously issued stating that the whole sum would

not be (nor was it) called for within a year.

2nd. That the action on an agreement to give or lend might be brought either in debt or case.

3rd. That notice of a call, though not expressly required by the statute, was necessary.

4th. That it was sufficient to allege in the declaration that the calls were made by order of the trustees, and that defendant had due notice of the calls, to wit, by notice in writing signed by the clerks to the trustees, and (at all events after verdict) without stating that the notice was given by order of the trustees.

5th. That an order by the trustees to pay the call into a certain bank to the account of the treasurer to the trustees was sufficient.

6th. That a notice in the names of the clerks, but signed only by a clerk in their employment, was insufficient, and, where proved to have been the only one given to the defendant, was not cured by his subsequent promise to pay; but, where not proved to have been the only one given, a good notice might be inferred from the fact of such promise to pay.

7th. *Semble*, that signature by one of two joint clerks in the name of both would be sufficient.

8th. That the acts of trustees who had not duly taken the oath were invalid.

9th. But that it was sufficient evidence of their having been sworn, that, in the first page of the book of proceedings, the signatures of the trustees were subscribed to the form of the oath (which had been copied there with blanks for the names), and that in the proceedings of the meetings entries were made that the trustees whose names were subscribed to the oath were sworn at such meetings.

10th. That the entries in the book,

which were made up by the clerks after the meeting, and signed by the chairman of the meeting subsequently, were good evidence; but that, as the statute did not make the book the only evidence, the absence of an entry might be cured by evidence of the express promise to pay. *Miles v. Bough*, 668

COMPENSATION.

See AGREEMENT, 1, 5, 6, 7. BRIDGE.

1. Under a Canal Act the land over which the canal passed was purchased by the Company, but the coal-mines and coal were reserved to the owners, their heirs and assigns, who were to be at liberty to work the mines *so as not to injure the canal*.

A., the owner of land over which the canal passed, sold it to the Company, and afterwards leased the coal up to the side of the canal on one side, and up to the towing-path on the other, to B.

A. subsequently contracted with the Company for the sale to them of the coal under the canal and towing-path, and eight yards on each side, which they required for the safety of their canal.

Held, that B. was entitled to compensation in respect of the interest in the coal which he had acquired under the lease, *viz.* the profit to be derived from the coal when gotten, after deducting the expenses of getting it.

Where the Legislature has provided a competent tribunal, and has given to it a certain jurisdiction, and made its decision final, no equity can be founded on an allegation that such tribunal is incompetent to decide questions properly within its jurisdiction. If any inconvenience arise from the legal exercise of that jurisdiction, the Legislature alone can apply a remedy.

Barnsley Canal Navigation Co. v. Twibill, 471

2. By a Railway Act (3 & 4 Will. 4, c. xlv), it is enacted in sect. 46, that if this Company wish to purchase *any part* of certain property, they shall not be authorized to compel the sale of or to take less than the whole of such property.

Sect. 47 provides, that the owner of any "house, manufactory, ground, or building," situate within fifty feet of the railway, may require the Company to purchase his rights and interests in such houses, manufactories, ground, or buildings.

A piece of ground, held under one lease, contained a principal dwelling-house, yard, and garden, occupied by a manufacturer, and a manufactory, and five smaller dwelling-houses in the occupation of under-tenants. The principal dwelling-house and garden only were within the fifty feet of the railway, and the Company did not wish to purchase any part of the property.

Held, that the owner could not compel the Company to buy more than the dwelling-house, yard, and garden. *The Queen v. London and Greenwich Railway Co.*, 138

3. By a Railway Act (6 & 7 W. 4, c. cxi, s. 138), it is enacted, that if any landowner, &c. shall not agree with the Company as to the amount of the purchase-money for his lands—or shall refuse to accept such purchase-money—or to treat with the Company—or should not agree for the sale—or shall by reason of absence, &c. be prevented from treating—or shall not disclose his title—or in any other case when agreement for compensation cannot be made—the Company shall issue their warrant to the sheriff to summon a jury to assess the purchase-money for such land, and the sheriff shall give judgment, and the verdict and judgment shall

be binding and conclusive upon all persons whatsoever. Provided that seven days' notice shall be given by the Company to the party of the time and place of holding the inquisition.

By sect. 140 such verdicts and judgments shall be deemed records to all intents and purposes.

Sect. 5 provides, that the Company may make the railway through lands omitted in the act, &c., if it should appear to two justices, *in case of a dispute about the same*, and be certified by them, that such omission proceeded from mistake.

In an action for use and occupation, the defence was, that the defendants had been lawfully evicted by the Railway Company under the above act. A special verdict was found, which stated that the plaintiff's premises in question consisted of a house, and a yard and garden occupied therewith, and included in the description thereof; that *the house* had been omitted in the schedule by mistake, and was so certified by two justices; that the Company had given the plaintiff notice to treat; that he did not disclose his title, or agree for the sale; whereupon they issued their warrant for assessing the amount of purchase-money, and gave him due notice of the inquisition; that the inquisition was held before the sheriff and the amount assessed; that the sheriff gave judgment for it, and that the Company had paid it into the Bank of England to the credit of the plaintiff.

The verdict set out the certificate of justices, the notices, and the inquisition, with the warrant annexed to it. The warrant, stating that it was issued pursuant to the act, commanded the sheriff to summon a compensation-jury, &c. The inquisition stated that the jury had been returned in obedience to the warrant, the pur-

chase-money awarded, and judgment given by the sheriff pursuant to the act.

It was objected—1. To the warrant and inquisition,—that they did not on the face of them shew jurisdiction, not stating which of the cases under sect. 138 had arisen to justify the taking compulsory proceedings, or the certificate of the justices; and that the inquisition did not set out the notice of inquisition. 2. To the certificate,—that it did not state that a *dispute* existed between the parties, so as to give jurisdiction to the justices, and that it certified as to *the house only*, omitting the *yard and garden*, which were also omitted in the schedule.

Held, 1st, that the warrant and inquisition being annexed together might be considered as one entire proceeding, and any deficiency existing in the one, be aided by reference to the other; and that as the warrant stated that it had been issued, and the inquisition that judgment had been given for the purchase-money, pursuant to the act, the proceedings themselves upon fair intendment afforded the inference, that a previous agreement for the purchase could not be made.

That the statement of the certificate was not necessary, the effect of it being simply to rectify the omission in the schedule, and to extend the operation of the statute to the land, &c. in the certificate, as if they had been originally inserted in the schedule.

2nd. That the fact of the justices being applied to, and granting their certificate, was evidence of a *dispute*, so as to render the statement unnecessary.

And that, as the verdict found that the yard and garden were parcel of and included in the description of the house, and occupied therewith, they

passed with it. *Taylor v. Clemson*,

S. C. in Error, 65
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4. By a Railway Act (6 & 7 Will. 4, c. cxxiii), empowering a Company to take lands, &c., it is provided (sect. 22) that, in case of differences between them and the owners of lands taken or damaged, the Company shall issue a warrant to the sheriff, and if such sheriff shall be a shareholder in the Company, or otherwise interested, then to the coroner, to impanel a jury to inquire of, assess, and give a verdict for the sum to be paid for the purchase of such lands, and also the sum to be paid for compensation for good will, &c., or any injury or damage sustained on account of the execution of the act, such satisfaction to be assessed separately and distinctly from the value of the lands. By sect. 27 it is provided, that in case a verdict shall be given for the same, or a greater sum than that offered by the Company, they shall pay all the costs, &c., of the inquisition, to be settled by the sheriff, &c., and to be recovered by distress. The 2 & 3 Vict. c. xcv, s. 22, enacts, that if the Company do not within twenty-one days after request issue their warrant for a jury, it shall be lawful for the claimant to send a request in writing to the sheriff for that purpose, who shall thereupon summon and impanel a jury, and proceed in the manner prescribed by the former act upon the issuing of the warrant by the Company.

In an action of debt, the declaration stated the construction of the railway and deterioration of the plaintiff's house by it; that he gave notice to the Company to purchase it, but that they did not treat with him for the purchase, nor for compensation for damages, &c., nor agree as to the value of the house or amount of compensation; that thereupon he requested

them to issue their warrant for a jury, but that they did not comply with his request; whereupon he requested the sheriff of Middlesex to summon a jury, to assess the sum to be paid for the purchase of his property and for compensation. That an inquisition was taken in pursuance of the said request before T. F. and M. G., Esqrs., then being sheriff of Middlesex; that a jury were impannelled and sworn; and that the plaintiff and the Company appeared by their counsel. That the jury found that the house was deteriorated by the railway, and gave a verdict for £250, to be paid to the plaintiff by the Company for the purchase of his interest, and also by way of compensation for damage, &c.; and that the sheriff gave judgment for the sum of £250 accordingly. That the verdict and judgment signed by the sheriff were deposited and still remained amongst the records of the quarter sessions. Allegation, that the plaintiff was willing to convey, &c.; but that the Company, though requested, had not paid the £250, or any part thereof. There was also a second count for the costs of the inquisition.

Pleas: 1. That T. F. Esq., was a shareholder in the Company, and therefore that the inquisition was void. 2. That the plaintiff adduced evidence, and the jury gave a verdict for the £250, not only for damage occasioned by the taking of the house, but also for damage occasioned thereto by reason of the construction of the railway: — *Held*, on demurrer, 1. That the objection that one of the persons constituting the office of sheriff was interested (if applicable to the case of a warrant issued by the Company) did not affect proceedings instituted by the claimant under the 2 & 3 Vict. c. xcv, s. 22, and that even if the proceedings were voidable, the Company

had waived the objection by appearing and taking part in the inquisition. 2. That the evidence objected to, being applicable to the question of the deterioration of the house, which was essential to the jurisdiction of the jury, was admissible. 3. That the provision of the 6 & 7 Will. 4, c. cxxiii, s. 22, as to the separate assessment of damages, is directory only. 4. That the provision as to costs, under s. 27, of the first act, does not apply to proceedings instituted by the claimant under s. 22 of the last. *Corregal v. London and Blackwall Railway Co.*, 411

5. Where an inquisition has been duly held before the sheriff to assess damages in pursuance of a precept issued by a Railway Company, under their act, (6 & 7 Will. 4, c. cvi), which provides (sect. 29) that such verdict shall be final, the Court refused an application for a mandamus to compel the issuing of a new precept, though made on the ground of misdirection, of the improper rejection of evidence, of the verdict being against evidence, and the damages grossly insufficient. *The Queen v. Eastern Counties Railway Co.*, 466.

6. By a Railway Act (6 & 7 Will. 4, c. cxxiii), a Company are empowered to take lands, &c., giving compensation to the owners, such compensation upon disagreement to be settled by a jury, to be summoned by the Company's warrant to the sheriff. Sect. 50 enacts, that, if any person shall be applied to by the Company to sell part of any house, &c., and shall by notice signify his desire to sell the whole, he shall not be compelled to sell less. By sect. 51, if any dwelling-house situate within fifty feet of the railway shall be deteriorated by it, the Company are required to treat for the purchase thereof, and for compensation for damage occasioned by taking it;

Provided that the Company shall not be compellable to purchase any portion of any dwelling-house, &c., which portion is situate at a greater distance than fifty feet from the railway; Provided also, that the Company, when called upon to take part of such dwelling-house, &c., may at their option take the whole. The 2 & 3 Vict. c. xcv, s. 22, in case the Company, upon request, shall not, within twenty-one days, issue their warrant for a jury, empowers the claimant to send a request to the sheriff for that purpose.

The owner of a dwelling-house, the greater part of which was within fifty feet of the railway, and the rest beyond it, called upon the Company to purchase the whole, in a notice which stated that the premises were within fifty feet of the railway, and were deteriorated by it, and claimed compensation. This notice being disregarded, he sent another notice, requiring them to summon a jury, which being also disregarded, he sent a precept to the sheriff, stating that the premises were within fifty feet of the railway, and deteriorated by it, reciting the above notices, and requiring the sheriff to summon a jury to inquire whether the property was deteriorated by the railway, and whether he was entitled under the statutes to have it purchased, and compensation made by the Company; and, if the jury should so find, to assess compensation.

On the inquiry, it appearing in evidence that part of the house was not within the fifty feet, the sheriff on that ground refused to hear further evidence, or to proceed with the inquiry, and directed the jury to find that the claimant was not entitled to have his property purchased by the Company. Upon motion for a mandamus to the sheriff to execute the precept:—

Held, that a house so circumstanced was properly called a house within fifty feet of the railway, and that the Company were bound to purchase the whole of it. *And* that the precept, although improperly raising as a question for the jury the fact of the house being within the prescribed distance, (without which they had no jurisdiction to inquire), was sufficient, and the Court issued the mandamus.

A rule was afterwards obtained, calling upon the Company to show cause why they should not pay the costs of the mandamus:—*Held*, that, as the necessity for the application had been caused by the mistake of the sheriff in his judicial capacity, the party defending his ruling were not liable to pay costs. *The Queen v. Sheriff of Middlesex, in re Walker v. London and Blackwall Railway Co.*, 396

7. By a Railway Act (6 & 7 W. 4, c. cix) it is provided (sect. 20) "that nothing in this act contained shall authorize the Company to take, injure, or damage for the purposes of this act any house or building which was erected on or before the 30th of November, 1835, without the consent in writing of the owner or other person interested therein, other than such as are specified in the schedule to the act annexed, unless the omission proceeded from mistake."

Sect. 35 provides for the settling of differences between the Company and the owners and occupiers of any lands taken, used, damaged, or injuriously affected by the execution of the powers granted by the act, and for the payment of satisfaction both for damages sustained, and for future temporary or recurring damages.

The Company, in the execution of the powers of their act, had erected a railway station and embankment near a house used as a starch manufactory,

and had thereby obstructed its light and caused damage to it by the dust and dirt drifted from the station, &c. The house was erected before the 30th November, 1835, had not been specified in the schedule, nor omitted therefrom by mistake, and no consent in writing to the construction of the station or embankment had been obtained from the owner or any other person interested in the house.

Held, that the Company were liable in an action on the case at the suit of the reversioner for such damage, and that the plaintiff was not confined to the remedy provided by the act for compensation.

Quære, whether in cases where the consequential damage to such house, &c. could not have been foreseen, as by stopping springs communicating therewith, such inconvenience will not afford a ground for limiting the general expression, and exempting the Company from liability to an action. *Turner v. The Sheffield and Rotherham Railway Co.*, 222

8. A Railway Act (6 & 7 Will. 4, c. cvi. s. 28) empowers "the owners and occupiers of lands through or upon which the railway and other works are intended to be made to agree to accept satisfaction or recompense for the value of such lands, and also compensation for any damage by them sustained by reason of the severing or dividing of such lands, and for any damage, loss, or inconvenience sustained by them by reason of the taking thereof, &c.; and in case the Company and such parties shall not agree as to the amount of compensation, &c., the same shall be ascertained by the verdict of the jury (if required) as thereafter directed." Section 29, "for settling all differences between the Company and the owners and occupiers of any lands taken and damaged, or injuriously affected by the execution of any of

the powers granted by the act," provides for the summoning of a jury by the sheriff, to inquire of, assess, and give a verdict for the money to be paid for the purchase of such lands, or by way of compensation (inter alia) for or by reason of the severing and dividing the same from other lands. Section 31 directs that such verdicts and the judgments thereon, being first signed by the person presiding, shall be deposited with, and kept by the clerk of the peace for the county, among the records of the quarter sessions, and shall be deemed records to all intents and purposes, and that such records and true copies of them shall be evidence. Section 111 enacts, that, in every case in which the owners, &c., of any lands shall, in their arrangements with the Company, have agreed to receive compensation for gates, &c., or passages, instead of the same being erected by the Company for the purpose of facilitating the passage to and from either side of the lands severed or divided by the said railway, it shall not be lawful for such owners, &c., to pass or cross the railway from one part to the other of the lands so severed and divided, otherwise than by a bridge, &c., to be erected at the charge of such owners. Section 216 authorizes the owners, &c., of lands, through which the railway shall be made, (except in cases where the Company shall have made proper communication), to pass and repass directly over the part of the railway made upon their lands, for the purpose of occupying them; which right, by section 217, is to cease as soon as the Company shall have constructed proper bridges, &c.

An owner of land severed by the railway claimed compensation from the Company; the question was submitted to a jury, who awarded to him compensation, on the footing that there was to be a total separation of

his land without any communication being made, and he received the payment as such compensation:—*Held*, that this was an *arrangement* with the Company under section 111; and that the owner of the land, afterwards crossing the railway for the purpose of the occupation of his land, was a trespasser within the 3 & 4 Vict. c. 97, s. 16. *Manning v. The Eastern Counties Railway Co.*, 637

9. By a Railway Act (7 Will. 4, c. xxii, s. 63) it is provided, that, where agreement for compensation for damages incurred in the execution of the act cannot be made, the Company shall issue their warrant to the sheriff to impanel a jury, who shall, upon their oaths, inquire of, assess, and give a verdict for the sum to be paid for compensation for the damages sustained. Sect. 206 takes away the certiorari in proceedings taken in pursuance of the act. The Company issued a warrant to the sheriff to impanel a jury to assess the sum of money, *if any*, to be paid to the claimant by way of compensation. The jury returned that he had sustained no damage:—*Held*, that, though the words “*if any*” ought to have been omitted, the warrant gave jurisdiction, and therefore that, the inquisition being a proceeding in pursuance of the act, the certiorari was taken away. *The Queen v. Lancaster and Preston Junction Railway Co.*, 725

10. By a railway act, 6 & 7 Will. 4, c. lxxx, empowering a Company to make a railway and to build a bridge over a river, it was recited that the construction of the bridge might effect a reduction in the amount of tolls received by the proprietors of a neighbouring bridge, and therefore enacted, that if, during the first three years from the opening of the railway for public use, there should be an annual

decrease in the tolls of the latter bridge, as compared with the receipts during the three immediately preceding years, then the Railway Company should pay to the proprietors of the bridge a sum equal to ten years' purchase of such annual decrease, taken upon an average of the three years during which the same should occur. The decrease having taken place, and a claim made for compensation:—*Held*, that an action of debt lay against the Railway Company for the amount; and the Court refused to grant a mandamus to compel the payment. *The Queen v. The Hull and Selby Railway Co.*, 705

11. By an Act, 7 & 8 Vict. c. ciii, a Company were empowered, by s. 79, to agree with the owners of certain lands, &c., including a brewery, for the purchase thereof. Sect. 83 provides, that the owners of such lands, in addition to compensation for their value, shall be entitled to, and may accept compensation for damage by reason of the severing or dividing of such lands, or otherwise. Sect. 106 provides, that, in case of difference between the Company and the owner of any lands taken, required for, or injuriously affected by the execution of the works authorized by the act, as to the value or compensation, the amount shall be settled by a jury. Sect. 117 provides, that such jury shall deliver their verdict for the sum of money to be paid for the purchase of the lands, and for the injury done *to the lands* of the party by their severance from the lands required by the Company, and also the sum to be paid by way of compensation for the damage occasioned *to any such lands* by the execution of the works, whether sustained before the injury or for future damage temporary or permanent: the sum to be paid for the injury by severance, or as compensation for such damage, to be

assessed separately from the value of the lands.

Held, that, under this act, a jury were justified in assessing compensation as follows :—"£400 for the purchase of the claimant's interest in the brewery, and £300 for the damage which he will sustain by reason of his having to give up his premises as a brewer, until he can obtain suitable premises in which to carry on his business."

A clause in such an act taking away the certiorari does not apply to the case of proceedings which operate upon something not within the act, though some part may be within it. *The Queen v. The Hull Dock Co.*, 795

COMPLAINT.

See MANDAMUS, 3.

COMPROMISE.

A., on whose fields a Railway Company had entered without notice or permission, filed a bill, and applied for an injunction to restrain them from digging away a part of one field and depositing it on a certain other field; but, it appearing that there had been a disposition to treat on the part of A., and it also being proved by affidavit that the steps taken by the Company were necessary for the public safety, the injunction was refused, upon an undertaking by the Company to pay into Court the probable value of the land taken.

A subsequent treating with a Railway Company will be considered by the Court as a waiver of objection to proceedings, the subject of the treaty, although such proceedings be not in fact authorized by the Railway Act.

Eight days' notice of intention to file a bill, where there has been a previous treating, held not sufficient to entitle a plaintiff to his costs.

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A court of equity discourages compromises which do not settle the whole of the matter in dispute, and which leave the question of costs still to be decided. *Tower v. Eastern Counties Railway Co.*, 374

CONSENT.

See CONSTRUCTION OF STATUTES, 2, 3.

CONSTRUCTION OF STATUTES.

See CARRIERS, 2, 3, 4.

1. By the London and Greenwich Railway Act it was provided, "that all such contracts, sales, and conveyances, shall be made at the expense of the Company:"—*Held*, that the expenses of the vendors, in making out their title to the land sold to the Railway Company, were included in the words "contracts, sales, and conveyances." *Ex parte Trustees of John Addey's Charity, in re London and Greenwich Railway Co.*, 119

2. By a Railway Act (1 Vict. c. xcvi) a Company were empowered to make a railway over certain lands to a certain point. Section 4 provides, that nothing in the act shall authorize the Company to enter the lands of any person, without the previous consent of the owner. Section 43 enacts, that, in every case in which the said railway shall cross any other railway, the communication, &c. between the two railways, in case of disagreement, shall be made in such manner as shall be directed by two engineers (one to be chosen by each party) and an umpire, whose decision shall be binding on all parties; Provided that the engineer of the Company, if the owner of the railway to be crossed shall, for twenty-one days after notice, neglect to appoint an engineer on his behalf, shall have

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power to make such communications, &c. as he shall think proper; that the said Company shall make satisfaction for damage, &c. occasioned by such crossing, and shall have full power at all times to cross such railway by means of such communication.

Held, that the 43rd section did not clearly impose a limitation on the general words of the 4th section; and, therefore, that the consent in writing of the owner of a railway, intended to be crossed by another railway, was still necessary under the latter section. *Clarence Railway Co. v. Great North of England, Clarence, and Hartlepool Junction Railway Co.*, 426

3. The 7th section of the Eastern Counties Railway Amended Act (1 & 2 Vict. c. lxxxi.) enacted, "that no road, wharf, yard, engine, station, loading or unloading places, warehouse, toll-house, building, machine or machinery, nor other erection should at any time or times thereafter be made or erected by the Company on any part of the estate of the plaintiff, nor within one mile of certain mansion-houses therein mentioned.

The Company, however, without such consent, erected a platform and made steps to the top of the embankment of the railway, and set down and took up passengers, and otherwise used the platform, &c. as a station, and commenced making a carriage-road from a certain lane to the top of the embankment.

The plaintiff obtained an injunction restraining the Company from using the station, platforms, stairs, steps, carriage-road, and other works and erections, for the purpose of communicating with the railway, or for the purpose of taking up or setting down passengers, and from stopping at or near the said station or the said platforms, for the purpose of taking up or setting down passengers or

goods, and from establishing or using any other or further works, buildings, or erections, upon either side of their railway at the place where the same was traversed by Stock-lane, and from making and using any road or way to communicate with the said railway at or near the same place, and within one mile of Ingatestone Hall, without the license and consent of plaintiff:—*Held*, on motion to dissolve, that the whole injunction should be continued until the defendants should remove the platform and stairs, and when that should have been done the injunction should be dissolved without further order, except as to the road; and the defendants were to pay the costs:

That the Company were not prevented, by the words of the 7th section, from stopping their engines when they pleased and letting the passengers get out as they best could:

That steps, or a permanent ladder, would come within the terms of the 7th section, and that a road, platform, and steps, would collectively constitute a station. *Lord Petre v. Eastern Counties Railway Co.*, 367

4. Where by an Act of Parliament it was provided, that "every carriage conveying passengers" was to be charged at a rate not exceeding 6d. per ton per mile:—*Held*, that the proper construction is, that the tonnage is to be taken upon the carriage, with the passengers upon it, and that the words, "conveying passengers" is not merely descriptive of the carriages, but indicative of the matters and things which are to be the subject of weighing, and to be in that respect subjected to tonnage.

The fact of no notice, or insufficient notice of the application for a private or local act, being given to an individual affected by it, is no ground for holding that the act, when passed, does not apply to such individual.

A party settling accounts, which may or may not have included, by reason of their generality, certain items, is not thereby precluded from claiming arrears due at the time of settlement, in respect of those items. *Edinburgh and Dalkeith Railway Co. v. Wauchope*, 232

5. Where, by a clause in an act of Parliament, it was enacted, "that nothing herein contained shall be construed to prevent any owner or occupier of any ground through which the said railway may pass from carrying, at his or their own expense, any railway or other road, or any cut or canal which such owner or occupier is authorized to make in his or her lands or grounds, across the said main railway, within the respective lands or grounds of such owner or occupier:"—*Held*, that the right given by this clause was not confined to the state of the land at the time the act passed, but was intended for the convenience of the occupiers, from time to time, of the land, partly on one side and partly on the other, of the principal railway, and that without reference to the title under which it was held.

Semble, no interdict will be granted to prevent a party, having the right to cross a railway, from prolonging and extending it, for the use of any persons with whom he might make an agreement for that purpose. *Monkland and Kirkintilloch Railway Co. v. Dixon*, 273

6. By a Railway Act (6 & 7 Will. 4, c. cxi, s. 94), a Company were empowered generally to divert, raise, sink, or deepen any roads, in order to carry the same over, under, or by the side of the railway, subject to the provisions and restrictions of the said act. By another act (7 Will 4 & 1 Vict. c. xxiv), enabling them to vary their line, they were authorized (s. 38) to carry the line of railway across a

certain turnpike road, by means of a bridge of the width of 30 feet at the least, and for that purpose to lower the then present bed of the road, provided that, in case it should be expedient to lower the surface of the road for the purposes aforesaid, then it should not be lawful for the Company to lower or alter *the present bed of the road*, unless the same should be lowered *on both sides of such bridge* so as to leave a certain inclination, and that the Company should make all new fences, &c., and *relay and reform the road*.

The Company made a bridge 30 feet wide, over a turnpike road 42 feet wide, consisting of 30 feet carriage way and two footways of 6 feet each. They lowered the carriage way of the road, but left the footways at their original level.

On the trial of certain traverses to a return to a mandamus which had issued to the Company to reform the road, and to lower it the whole width of 42 feet, the jury found—1. That the Company had not so lowered the road. 2. That they had *reformed* the road, in compliance with the act. 3. That the road so made by the Company *was more commodious to the public*, than if the whole road had been lowered to the full width of 42 feet.

The Court of Queen's Bench held that the word "road" meant the whole road, including footpaths; and, therefore, that the Company had not *reformed* the road as required by the act; and that the finding of the jury upon the last issue, as to its being *more commodious*, was not sufficient to dispense with a compliance with the language and meaning of the act.

On judgment that a peremptory mandamus *non obstante veredicto* should issue and the prosecutors recover their costs,

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Held, by the Court of Exchequer Chamber, that it was not a good return to the mandamus that the carriage road and footpath as they now exist are more commodious and convenient to the public, &c., than if lowered as required by the writ.

But *held* (reversing the judgment of the Court of Queen's Bench) that, by the words in the 38th section, "bed of the said turnpike road," the act intended that the carriage road only should be lowered; and that the full breadth of the former carriage road was not intended to be preserved *under the bridge*, but only as to the part of the road lowered as it descends to the bridge on one side and ascends from it on the other. *Manchester and Leeds Railway Co. v. The Queen*, 633

See *The King v. Glamorganshire Canal Co.*, 16.

7. By a Canal Act (6 & 7 Will. 4, c. ci) a Company were incorporated for the purpose of improving the navigation of the river Parrett, and (by sect. 121) they were empowered to take tolls in respect of the transit or conveyance of goods upon it:—*Held*, in the absence of any express enactment on the subject, that the Company were not charged with any liability not essential to the improvement of the navigation, and, therefore, were not liable to cleanse the river, or clear away weeds, which, though injurious to the adjoining landowners, were found to be beneficial to the navigation. *Parrett Navigation Co. v. Robins*, 383

8. By the 6 & 7 Will 4, c. cviii, it is enacted (s. 108), that the business of the Company shall be carried on under the management of *twelve* directors, to be chosen from time to time from certain qualified proprietors, who shall have the general management, &c., of the business of the Company, the custody of, and power

to use their common seal, and to do all things necessary for carrying on the business, to enforce the powers, &c., and to bind the Company, as if the same were done by the whole corporation. By s. 109, nine persons are named as the first directors, and provision is made for their retiring by rotation, and the election of *twelve* new directors. Sect. 112 enacts, that when any vacancy shall occur by death or any other means than by going out of office by s. 109 (i. e. by rotation), it shall be lawful for the remaining directors to elect some other qualified proprietor to be a director. By s. 116, *five* directors are sufficient to constitute "a Court of directors." And by s. 123, it is enacted, that if any proprietor neglect to pay his calls, it shall be lawful for the said Company to sue for and recover the same.

In an action brought by the Company against a proprietor for calls, the defendant suffered judgment by default on the 10th of March, and on the 31st of May moved to set aside the judgment, on the ground that there were only seven directors; who therefore had no authority to bring an action.

Held, that the objection was at all events too late, and that, if the absence of the full number of directors was an answer to such action, it ought to have been pleaded.

But *semble* that the clause (s. 108), as to the business of the Company being under the management of *twelve* directors, is directory only. *Thames Haven Dock and Railway Co. v. Rose*, 177

9. By a railway act, 6 & 7 Will. 4, c. lxxx, empowering a Company to make a railway and to build a bridge over a river, it was recited that the construction of the bridge might affect a reduction in the amount of tolls received by the proprietors of a neigh-

bouring bridge, and therefore enacted, that if, during the first three years from the opening of the railway for public use, there should be an annual decrease in the tolls of the latter bridge, as compared with the receipts during the three immediately preceding years, then the Railway Company should pay to the proprietors of the bridge a sum equal to ten years' purchase of such annual decrease, taken upon an average of the three years during which the same should occur. The decrease having taken place, and a claim made for compensation:—*Held*, that an action of debt lay against the Railway Company for the amount; and the Court refused to grant a mandamus to compel the payment. *The Queen v. The Hull and Selby Railway Co.*, 705

10. By a Railway Act (7 & 8 Vict. c. lx, s. 136), a Company were empowered to agree with the owners of lands, which they were authorized to take for the purposes of the railway, for the absolute purchase of such lands. Sect. 153 provides, "that, if the owner of any such lands, on tender of the purchase-money or compensation agreed or awarded to be paid, refuse to accept the same, or if any such person *fail to make out a title* to the lands in respect whereof such purchase-money or compensation should be payable, to the satisfaction of the Company, (or in certain other cases therein specified), it shall be lawful for the Company to deposit the purchase-money or compensation payable in respect of such lands in the Bank of England, to the credit of the parties interested in such lands, &c., and thereupon all the interest in such lands should vest absolutely in the said Company." Sect. 164 provides, "that, if any difference shall arise between the Company and the owner of any such lands as to the value of the lands or the compensa-

tion to be made in respect of them, or if (inter alia) any such owner *fail to disclose or prove his title* to any such lands, in all such cases the amount of the compensation to be paid by the Company is to be attested by a jury."

By sect. 158, the Company are prohibited entering on land, except by consent, until they shall have paid to the party interested, or deposited in the Bank, the purchase-money or compensation agreed or awarded to be paid. And sect. 159 enacts, "that, if the Company shall *wilfully* enter upon any land without such consent, or without having made such payment or deposit, they shall forfeit £10; and if the Company shall, after conviction in such penalty, or after notice from the party in possession of such lands, continue in unlawful possession of any such lands, they shall be liable to forfeit £25 for every day they so remain in possession. *Proviso*, that nothing shall be held to subject the Company to the payment of any such penalties, if they shall *bonâ fide* and without collusion have paid or *deposited* the compensation agreed or awarded to be paid in respect of the said lands to any person whom the Company may have reasonably believed to be entitled thereto, although such person may not have been legally entitled thereto."

Held, first, that the language of the 153d section is prospective, and applies to the time after the purchase-money or compensation shall have been agreed or awarded to be paid; and, therefore, that the failure by an owner to disclose his title *before* the inquisition was not such a failure to make out a title as was intended by sect. 153, and that the Company were not authorized to deposit the amount awarded in the Bank, and take possession of the land, without calling upon the owner, *after* the inquisition, to make out his title.

Secondly, that the word "wilfully," in sect. 159, does not override the whole section, and does not extend to that part which imposes a penalty for continuing in unlawful possession after notice.

Thirdly, that the Company, who had bonâ fide and without collusion, though without complying with the requisites of the statute, paid the compensation awarded by the jury into the Bank of England, and taken possession of the land, were protected, by the proviso in sect. 159, from the penalties imposed by that section on the continuance in unlawful possession of land after notice. *Hutchinson v. The East Lancashire Railway Co.*, 748

CONTRACTS.

1. A Railway Company contracted with the plaintiff for the supply, at a certain price, of chalk stone for ballast, to be broken, carted, and stacked to the satisfaction of the Company's engineer, who was to have full power to stop the work at any time, upon giving due notice.

By a second contract between the same parties, the ballast was to be properly screened, also to the engineer's satisfaction, and an increased price was to be paid for it so screened.

In an action brought against the Company to recover the price of the work done at the increased rate, no evidence was offered by the plaintiff of its having been screened to the satisfaction of the engineer, who, being called by the defendants, proved that it was not so. The learned Judge directed the jury, that as, by the contract, it was to be screened to his satisfaction, they should find for the defendants. The jury having found a verdict for the

plaintiff, the Court granted a new trial.

But inasmuch as the verdict did not appear to be so perverse, as to be deliberately, with determination, against the Judge's direction, the rule was granted only on payment of the costs of the former trial. *Parkes v. Great Western Railway Co.*, 17

2. A Railway Company, being by their act empowered to sell any lands or hereditaments which they did not require for the purposes of their railway, were, by a proviso in the same act, directed, before they should dispose of any such lands, to offer to sell the same to the person or persons whose lands should immediately adjoin the lands, &c., so proposed to be sold; the person from whom such lands, &c., were purchased, if the owner of the adjoining lands, to be always preferred.

The Railway Company put up certain premises for sale by auction, without having made any offer to sell the same to the adjoining owners.

The defendant, who was the purchaser of part of the property sold, took this objection, whereupon the Company made an offer to the owner of the adjoining land, which was declined.

The defendant persisting in his objection, the Company filed a bill for specific performance, and the Court directed a case to a Court of law, which decided that, by the subsequent offer to the owner of the adjoining premises, the Company had a power to sell and convey the premises in question to the defendant.

Held, upon the equity reserved, that the circumstance of the Company not having, at the time of the sale, made the offer to sell to the owner of the adjoining land, did not prevent them from *contracting*, although it might have prevented them from carrying their contract into execution by

a conveyance. That having set themselves right by their subsequent offer, they had a right to enforce the contract.

Specific performance, without costs, decreed. *London and Greenwich Railway Co. v. Goodchild*, 507

3. A Railway Company, under the provisions of their act, were empowered to take lands, and it was made lawful for "all corporations, &c., and for all other persons whomsoever, to contract for sale of, and convey the same to the Company." The Company gave notice of their intention to treat, to A., who was at that time, and continued until his death, in an imbecile state of mind. Previously to becoming imbecile, A. had made a will whereby he gave and bequeathed "all my money, goods, chattels, estates, and effects of what nature or kind soever and wheresoever the same may be found," to his wife for life, and after her decease to his children equally. A. died before the purchase-money for the piece of land taken by the Company, which had been assessed by a jury, had been paid.

Held, that the Railway Company could not pay over the purchase-money or procure a conveyance, except under the direction of a Court of equity.

That under the devise the real estate of the testator passed.

That the land was not converted by the proceedings under the Railway Act, and that the purchase-money belonged to the devisees of the land.

That A. (some of the necessary parties to a conveyance being infants) was a vendor within the meaning of the 1 Will. 4, c. 60, s. 16. *Midland Counties Railway Co. v. Oswin*, 497

4. A Railway Act (6 & 7 Will. 4, c. lxxvii, s. 147) enacts, that the shares shall, to all intents and purposes, be

deemed personal estate, and not of the nature of real property; sect. 148 enacts, that the conveyance shall be in writing, and gives a short form of conveyance to be executed by the seller and purchaser:—*Held*, nevertheless, that, in order to enforce a contract for the transfer of shares, the purchaser must tender a conveyance to the vendor, as in the case of sales of real property. It is not, therefore, sufficient to aver in a declaration that the defendant promised, and was requested by the plaintiff to transfer the shares, and that the plaintiff was ready and willing to accept them, without averring the tender of a conveyance; but it is not necessary to aver a tender of the purchase-money. *Stephens v. De Medina*, 454

5. Contracts for the sale of railway shares are not within the Stock Jobbing Act, 7 Geo. 2, c. 8. *Hewitt v. Price*, 175

6. The plaintiff entered into certain contracts with a Railway Company, whereby it was agreed (inter alia) that the engineer of the Company should, every fortnight, ascertain the value of the work done, according to its quantity and relative proportion to the whole works, and that the plaintiff should, on production of the certificate of the engineer, receive £80 per cent. of such value, the remaining £20 per cent. being reserved by the Company until such reserve should amount to £4000. That if the engineer should not be satisfied with the works, the Company should be enabled, after notice given to the contractor, and his default in complying therewith for seven days, to take possession of the works, and thereupon the plant and materials of the contractor, the value of the work done and not paid for, and the reserve fund, should become forfeited to the Company. In the course of the work, the Company advanced

several sums of money to the plaintiff, upon the security of an assignment of his plant and machinery upon the works comprised in the contracts, and of the reserve fund. The Company having given the required notice, and, at the expiration of the seven days, having taken possession of the works, plant, and machinery, the plaintiff filed his bill, insisting that the engineer had not so estimated the works as to give to the plaintiff the £80 per cent. to which he was entitled, and that upwards of £30,000 was due to him under the several contracts for works actually completed; insisting also that no forfeiture had been incurred by him; and praying that the Company might elect to permit the plaintiff to complete the works, or otherwise that the contracts might be considered at an end; and praying in either alternative for the taking of accounts between the plaintiff and the Company.

The plaintiff amended his original, and filed two supplemental bills, and thereby stated that masonry, and other works of the most expensive kind, had been paid for at the price of inferior masonry and works, and claimed large sums in respect thereof; and also alleged fraud against the Company, both in respect to the contracts and also in respect to the certificates, and prayed relief therefrom, &c. :—

Held, that the investigation as to the sufficiency of the payments to the plaintiff must be made in a Court of equity, and cannot be made at law.

That the evidence in support of an allegation of fraud must be very clear, and that it is not sufficient for the contractor to shew that the statements of a Company, with regard to the nature of the work to be contracted for, gave imperfect information, but he must also shew that he could not, with reasonable diligence,

have acquired all necessary information.

That clauses contained in contracts, conferring on the engineer any power or authority over the contractor, will not be considered by the Court as fraudulent or void on account of the engineer being a shareholder in the Company, on whose behalf such contracts were entered into.

That the engineer can decide as to the quality of work done, but cannot decide as to the quantity and amount of such work. The question of measurement and calculation will be entertained and decided by a Court of equity.

That where the plaintiff has entered into a subsequent contract with a Company, the Court will not direct inquiries as to the amount of unliquidated damages claimed in respect of antecedent grievances, but will consider the new contracts as a condonation, unless, at the time of making them, the plaintiff insisted on his adverse claims—the parties being at liberty to proceed at law.

The Company, by their answer, having stated that the plaintiff was not entitled to a settlement of the accounts until all the works should have been completed :—*Held*, that the plaintiff, having, at the hearing, asked for a settlement of accounts, was entitled, from the admission in the answer, (although the works were completed by the Company, and not by the contractor), to have a final account taken.

That, under the clause of forfeiture, there was no forfeiture of the sums necessary to make up the deficiency in the payments under the certificates of four-fifths of the value of the work done; and the Court directed an inquiry to ascertain whether they were the full sums or not.

Where the evidence as to the nature of masonry is conflicting, a re-

ference will be directed to the Master to inquire, state, and accurately define the sorts of masonry with respect to which the question arises.

That stipulations as to penalties in contracts for railway works are binding on the contractor.

Where no fraud can be shewn, no relief will be granted against a forfeiture provided for by a clause in the contract.

Where it had been agreed that the provisions of a written contract should in all respects, as far as applicable, apply to an unwritten contract:—*Held*, that stipulations as to forfeiture contained in the written contract should extend to and form part of the unwritten contract. *Ranger v. Great Western Railway Co.*, 298

7. By a Canal Act (6 & 7 Will. 4, c. ci), a Company was incorporated for the purpose of improving the navigation of the river Parrett, and (by sect. 121) they were empowered to take tolls in respect of the transit or conveyance of goods upon it:—*Held*, in the absence of any express enactment on the subject, that the Company were not charged with any liability not essential to the improvement of the navigation, and, therefore, were not liable to cleanse the river, or clear away weeds, which, though injurious to the adjoining landowners, were found to be beneficial to the navigation. *Parrett Navigation Co. v. Robins*, 383

8. In an action of debt, the declaration stated that, by an indenture of December, 1837, in consideration of the sum of £250,000, the plaintiff covenanted with the defendants to make and complete a certain railway, and to provide railway bars or rails and chairs on or before the 1st of May 1840; that afterwards, by another indenture of March, 1839, in consideration of the further sum of £1500, the plaintiff covenanted with

the defendants, that he, being provided by them with bars or rails and chairs for temporary and permanent use, would complete the said railway, and certain other works, on or before the 1st of June 1840; provided that, if the plaintiff should not complete the said railway by that day, he should pay the defendants the sum of £300, and the like sum for every succeeding day until the work should be completed, so that the whole amount forfeitable should not exceed £15,000. Breach, that the defendant detained from and did not pay the plaintiff £20,000, parcel, &c. Plea, as to £7500, parcel of the £20,000, that the said sum of £7500 is parcel of the sum of £15,000 agreed to be retained by the defendants; that the plaintiff did not complete the railway on the 1st of June, 1840, nor until twenty-four days after, whereby the plaintiff then became liable to pay the defendants the sum of £300 for the twenty-five days during which the railway remained incomplete, by reason of which the defendants deducted and retained the said sum of £7500 out of the monies payable by them to the plaintiff. Replication, that the plaintiff did not become, nor was liable to pay the defendants, *modo et formâ*.

At the trial it was proved that the plaintiff did not complete the railway until twenty-four days after the 1st of June, but that the defendants had not provided him with sufficient bars or rails and chairs to enable him to complete it by that day, whereupon the learned Judge directed the jury that such supply was a condition precedent to the defendant's right to deduct the penalty:—*Held*, that this was a misdirection, the covenants being independent, and the supply of the bars, &c. not a condition precedent to the right of the defendants to make the deduction. *Macintosh*

v. The Midland Counties Railway Co., 780

9. Railway shares, though an interest in a partnership, and not assignable at law, may be the subject of a valid contract, which may be sued on at law.

In assumpsit for not delivering railway shares pursuant to a contract the plaintiff in his declaration averred, "that he had always from the time of making the agreement, been ready and willing to accept the transfer of the shares," and that although, after the lapse of a reasonable time for the transfer, he requested the defendant to transfer the shares, and tendered and offered to pay for them, the defendant did not transfer, &c. Plea, that the plaintiff was not always from the time of making the agreement ready and willing to accept the transfer, &c.:—*Held*, on special demurrer, that the allegation of time in the declaration being divisible, the traverse was too large, and the plea bad. *Tempest v. Kilner*, 790

CONVENIENCE.

See COMPENSATION, 7, 8.
HIGHWAY.

CONVEYANCE—Costs of.

A landowner, having contracted in writing for the sale of a piece of land to a Railway Company, died, having devised all his real estate in strict settlement:—*Held*, that the costs of the suit, instituted for the purpose of procuring a conveyance to the Company under 1 Will. 4, c. 60, were to be defrayed out of the purchase-money.

Although it be necessary, if any of the parties interested be infants, that the conveyance should be settled by the Master, yet the Court will sometimes peruse the conveyance in order

COSTS.

to save the expense of a reference. *Eastern Counties Railway Co. v. Tufnell*, 133

CORONER.

See INQUISITION.

COSTS.

See AFFIDAVIT.

COMPENSATION, 4, 6.

COMPROMISE.

CONSTRUCTION OF STATUTES, 1, 3.

CONTRACTS, 1, 2.

CONVEYANCE.

MANDAMUS, 3.

1. Upon the construction of the 61st and 66th sections of the 7 Geo. 4, c. xlix:—*Held*, that the tenant for life of lands taken by the Railway Company was to pay the expenses of the interim investment of the purchase-moneys which had been paid into Court. *Ex parte Cooke, re Liverpool and Manchester Railway Co.*, 135

2. Where part of the purchase-money remained in Court to await the decision of contested claims, the Eastern Counties Railway Company were, under the 48th section of their act, held liable to pay the costs of the application of the person rightly entitled to have the money paid to him. *Ex parte Gardiner, re Eastern Counties Railway Co.*, 117

3. When purchase-money of lands taken by a railway Company, under the provisions of their acts, is directed to be paid into Court and re-invested in the purchase of other lands, the Court will allow the costs of two such investments. *Ex parte Trustees of Waste Lands of Boxmoor, in re London and Birmingham Railway Co.*, 513

4. Costs of a third re-investment of purchase-money granted to the

vendor, the entire purchase-money being very large. *In the matter of St. Katherine's Dock Co.*, 514

5. Where, by a Railway Act, a power was reserved to the Court to order the reasonable expenses of re-investing a sum of money in the Bank, the produce of land purchased by the Company, to be paid by the Company, the Court will order the costs of two applications for re-investment of parts of the same sum to be paid by the Company.

Semble, the costs of any further application must be borne by the parties applying. *Ex parte Provost and Fellows of Eton College, re London and Birmingham Railway Co.*, 271

6. Costs of making absolute a rule for a mandamus, and the costs of the writ and application, such rule having been occasioned by the mistake of the sheriff, refused. *The Queen v. London and Blackwall Railway Co.*, 409

7. After argument and judgment on a return to a mandamus, the Court will, as a *general* rule, give costs to the party succeeding, under stat. 1 Will. 4, c. 21, s. 6. *The Queen v. The Eastern Counties Railway Co.*, 186

COVENANT,

Specific Performance of.

See **CONTRACTS**, 2.

By an indenture of agreement entered into by the defendants with the plaintiff, the defendants covenanted "that they would construct and for ever thereafter maintain one neat archway, sufficient to permit a loaded carriage of hay to pass under the railway, at such place as the plaintiff, his heirs and assigns, should think most convenient in his pleasure grounds, and should form and complete the approaches to such arch-

way." The defendants having neglected to comply with the plaintiff's request to fulfil the covenant, a bill was filed to compel a specific performance.

Held, that the Court will interfere for the purpose of directing the specific performance of a contract by defendants to do defined work on their own property, in the performance of which the plaintiff, with whom they have covenanted, has an interest so material that the non-performance cannot be adequately compensated by damages at law. *Storer v. Great Western Railway Co.*, 106

DAMAGES—*At Law.*

See **AGREEMENT**, 6, 7.

COMPENSATION.

COVENANT.

DEMAND AND REFUSAL.

Where certain works, authorized by a Railway Act (6 & 7 W. 4, c. xxxvi) to be done in a particular manner, and in a specified time, have been completed by the Company, in a manner which is objected to; in order to obtain a mandamus to enforce the performance in the way required by the act, it should distinctly appear that a specific complaint has been made to the Company, since the completion of of the work; and a distinct demand of what the party moving desires to enforce, and a refusal, in effect, by the Company.

Expressions of disapprobation while the works are proceeding, though proper to be made, do not relieve such party from the necessity of specifically demanding a proper compliance with the statute after the works are done, as without it he might be supposed to have waived his objection. *The Queen v. Bristol and Exeter Railway Co.*, 433

DEMURRER.

The Deptford Pier Company having contracted for the purchase of certain lands, applied to W. T. P. to lend them the money to complete their contract, which he accordingly did. The conveyances were made to W. T. P., by way of mortgage, for securing the repayment of the sum advanced, and subject thereto in trust for the Company. W. T. P. afterwards obtained judgment, and was about to get possession under an *elegit*. The mortgagees of the "tolls, rates, and duties," who had advanced monies to the Company, on the security of certain mortgage debentures issued by the Company, in conformity with a power contained in the 16th section of their act, filed their bill against the mortgagees of the land, for the purpose of having the priority of such debentures declared, and praying an injunction and receiver:—*Held*, upon demurrer, that the plaintiffs were right in using the powers the law gave them, and that there was no equity in the mortgagees of the tolls, rates, and duties, as against the mortgagees of the land. Demurrer allowed with costs. *Perkins v. Pritchard*, 95

DIRECTORS.

See CALLS.

CONSTRUCTION OF STATUTES, 8.
COMPANY.
SERVICE.

DISPUTE.

See COMPENSATION, 3.

EASEMENT.

See AWARD.

Case by a reversioner against a Railway Company for entering and making a railway on his land.

Plea, that, before the reversion of the plaintiff, the dean and chapter of

Durham were seised in fee, and by indenture between them and the plaintiff demised to the plaintiff the lands in question for a term, "excepting and reserving the mines under the same, with power to dig, win, and carry away the said mines, with free ingress, egress, and regress, wayleave and passage to and from the same, or to or from any other mines, lands, and grounds, on foot and on horseback, and with carts and all manner of carriages, and also all necessary and convenient passages, conveniences, privileges, and powers whatsoever, for the purposes aforesaid, and particularly of laying, making, and granting waggon ways in and over the last-mentioned premises, or any part thereof." The plea then justified the making the railway by the defendants, as the servants of the dean and chapter, and by their authority.

Replication, admitting the seisin in fee of the dean and chapter, and the demise to the plaintiff, and that he had no other title except under such demise,—*de injuria*, &c., on which issue was joined.

On the trial, it appeared that the Railway Company had made a double line of railway on the plaintiff's land, under a deed executed by the dean and chapter, authorizing the Company to make such a railway for the conveyance of *passengers, coals, goods, wares, and merchandize*. The railway was constructed for the purpose of conveying general goods and passengers as well as coals, but had not been actually so used, and the railway was no more than was necessary for the carriage of the coals likely to be sent along it from the part of the county with which it communicated.

The learned Judge directed the jury that, if they thought the railway was made for other purposes *as well as* for the carriage of coals, the plaintiff was entitled to the verdict.

Held, that if the railway was such a railway as the Company, at the time when it was made, might lawfully make for the purposes for which when made, they might lawfully use it, the plaintiff, as reversioner, had no ground of complaint by reason of the intention of the Company to use it also for other purposes for which they had no right to use it, and that the direction of the Judge was wrong.

That the proper question for the jury was not, whether the railway was made for other purposes as well as for the carriage of coals and minerals, but whether, at the time when the road was made, it had become necessary or expedient for the Company to make a road for the purpose of getting the excepted mines, and if so, whether the road actually made was a proper road for that purpose, assuming that it would be used for no other object.

That the only right reserved to the dean and chapter under the above clause in the indenture of demise by them to the plaintiff was that of making and granting the right of making ways over the demised lands for the purpose of getting the excepted woods, mines, and minerals.

That the right possessed by the dean and chapter under the clause as lessors, was not the subject of an exception, as it was no parcel of the thing granted; nor of a reservation, as it did not issue out of the thing granted; but that it was an easement newly created by way of grant from the lessee. And that it was to be presumed that the deed was executed by both parties, lessee as well as lessors. *Durham and Sunderland Railway Co. v. Walker*, 36

EJECTMENT.

In ejectment to recover land forming part of the bed of a canal in the

occupation of an incorporated Company, service of declaration on the clerk of the Company at their office is sufficient for a rule nisi. *Doe d. Fisher v. Roe*, 145

ENGINEER.

See CONTRACT, 1, 6.

EQUALIZATION OF TOLLS.

See CARRIERS, 1, 2, 4.
MANDAMUS, 2.

ESTREAT.

See INQUISITION.

EVIDENCE.

See AGREEMENT, 1.

The discovery, after decree, of material evidence which had existed before the commencement of the suit, affords sufficient ground for a supplemental bill in the nature of a bill of review; but such bill cannot be filed without the leave of the Court, and the Court, before granting such leave, will require to be satisfied that there has been no want of attention or diligence on the part of the applicants.

Two of the original directors of the S. Railway Company, were also proprietors of shares in, and one of them was also on the committee of management of the S. Canal Company, during the progress of a suit instituted by the S. Canal Company against the Railway Company, for the specific performance of an agreement.

Prior to the institution of the suit, a meeting of the directors of the railway had taken place, and a report and resolutions touching the matters in dispute passed.

On the production of the Company's books no entry of the report

or resolutions appeared in the open parts of the books, and the sealed parts thereof were sworn not to contain anything material to the plaintiffs.

The Railway Company were bound by the provisions of their act to enter all reports and proceedings in their books.

Upon a motion for leave to file a supplemental bill in the nature of a bill of review, supported by an affidavit of the clerk of the Canal Company, to the effect that he did not know of the report and resolutions, and that he believed that the former clerk and the committee of the Canal Company were ignorant of them, leave to file such bill was granted. Costs reserved. *Sheffield Canal Co. v. Sheffield and Rotherham Railway Co.*, 486

FOOTPATH.

See CONSTRUCTION OF STATUTES, 6.

FORFEITURE.

See CONTRACTS, 6.

FRAUDS, STATUTE OF.

See AGREEMENT, 2.

HIGHWAYS.

See BRIDGE, 1.

CONSTRUCTION OF STATUTES, 6, 9.

1. By a Railway Act (7 Will. 4, c. xxii. s. 29) a Company were empowered "to divert or alter any roads or ways, in order the more conveniently to carry the same over or under the railway."

The Company in carrying a road under the railway had erected a skew bridge, which diverted the road to an angle of 45°, instead of 34°, which was the angle made at that particular

point by the old line of road. At the trial of an indictment against the Company's engineer for so doing, the learned Judge directed the jury, that, if the public sustained inconvenience by the alteration, they should find for the Crown; but that, if the work was done in a mode in which an experienced engineer would do it, having reasonable regard to the interests both of the Company and the public, the Company had a right to make such diversion. The jury having found for the defendant on the ruling, the Court refused to grant a new trial.

Semble, that *conveniently* means conveniently both for the Company and the public. *The Queen v. Sharpe* 33, n.

2. By a Railway Act (6 & 7 Will. 4, c. cix) a Company was empowered (s. 94) to divert or alter the course of any roads or ways, in order the more conveniently to carry the same over or under or by the side of the said railway. By s. 97, it was enacted that in all cases, wherein, in the exercise of such power, any part of any carriage road, &c., should be found necessary to be cut through, raised, sunk, taken, or so much injured as to be impassable or inconvenient for passengers or carriages, &c., or to the persons entitled to the use thereof, the Company should, at their own expense, before any such road, &c., should be so cut through, &c., cause a good and sufficient carriage road, &c., to be set out and made instead thereof, *as convenient* for passengers and carriages as the former road, or *as near thereto as might be*.

The Company had diverted a highway, and obstructed the old road by building a wall across it, and had made a new road, which was neither as convenient to the public as the old one, nor as near thereto as might be.

Held, that they were indictable, in the common form, for so obstructing the highway. *The Queen v. Scott*, 187

HOUSE.

See COMPENSATION, 2, 3, 4, 6, 7.

INCLINATION OF ROAD.

See CONSTRUCTION OF STATUTES, 6.

INDICTMENT.

See HIGHWAY, 2.

The Court of Q. B. refused to quash an indictment against a Company by their name of incorporation, upon motion, but left the defendants to demur, with liberty to plead over, if the demurrer should be over-ruled.

And *held*, upon demurrer, that an indictment will lie against a corporation aggregate by their name of incorporation for a nonfeasance.

And where a corporation cannot appear by attorney, as in the case of an indictment found at the assizes or sessions, the proper mode of proceeding against them, to enforce the remedy by indictment, is by distress infinite to compel appearance, after removal by certiorari. *The Queen v. Birmingham and Gloucester Railway Co.*, 148

INJUNCTION.

See AWARD.

CARRIERS, 1.

COMPROMISE.

CONSTRUCTION OF STATUTES, 3, 5.

1. An information was filed at the relation of the trustees of a turnpike-road against a Railway Company, in order to compel them to remove a temporary bridge, which had been erected for the purpose of conveying spoil earth over the road, or to compel them to set out a new road:—*Held*,

on motion to dissolve an injunction granted *ex parte*, that the operation of the injunction should, on certain terms, be suspended for seven weeks, or until further order, no case of practical inconvenience having been made out, although there had been a clear infraction of the law. *Attorney-General v. Eastern Counties Railway Co.*, 337

2. A., being seised of a ferry over the river Bure, obtained an act of Parliament enabling him to substitute a bridge for the ferry, and enacting that any persons who should evade the tolls by conveying passengers, &c. over the river, otherwise than by the bridge, should subject themselves to a penalty of 40s. for every such offence, to be recovered in a summary way before a justice of the peace, and levied by distress, and, in case of insufficient distress, a power was given of committing the offender; any party aggrieved might appeal to the quarter sessions, but it was enacted, that no order or proceedings under the act should be removed by certiorari or any other suit or process to any Court of record at Westminster. The Yarmouth and Norwich Railway Company purchased of the owner of the ferry a piece of land for a terminus, within the undoubted limits of the ferry, and a clause was inserted in their act, that they would not erect a bridge over the river Bure, without the consent of the plaintiff or owner for the time being of the bridge; and that nothing therein contained should prejudice or affect the right or title of the plaintiff to the bridge or ferry, or the tolls payable in respect thereof. The Railway Company, upon the opening of their line, dug a canal to the river, and, by means of a steamboat, conveyed their passengers, &c. from their terminus to a part of Yarmouth much below the site of A.'s bridge.

On a motion for an injunction to restrain the Railway Company—*Held*, that, where the injury is small, and the means of approximating very nearly to the amount of probable damage are given, and where there is no reasonable ground for apprehending an infringement of right by others, the Court will not prejudice the legal question by granting an injunction, but will put the parties on certain terms until the decision of the legal right.

That where the Court is not clearly satisfied with respect to the legal right, it will be guided by the balance of inconvenience.

That irreparable mischief or extreme damage, which cannot afterwards be compensated, or the impossibility of ascertaining the proximate amount of damage, will afford sufficient reasons for the interference of the Court.

That where the whole question is fully before the Court by affidavits, so that the points in dispute are sufficiently and distinctly raised, the Court will direct an issue upon an interlocutory application.

That where the only remedy given by an act is by recovering penalties *de die in diem*, in a summary way, this Court has the power of protecting, by injunction, the right of the person in whose favour such remedy is given. *Cory v. Yarmouth and Norwich Railway Co.*, 524

3. Plaintiffs moved for an injunction to restrain the defendants from using, in a manner alleged to be illegal, a communication carried by certain branch rails from plaintiffs' to defendants' railway; and also from using certain other rails, which connected a certain other railway with the defendants' station north of F.; and also from using a station built by the defendants on ground purchased by them of the plaintiffs:—*Held*, that a Court of

equity will not interfere by injunction, but will leave the parties to their legal remedies, plaintiffs having failed to shew, that, by using the communications, rails, or station, any destruction or irreparable injury would result.

In cases of trespass under colour of title, where the mischief apprehended is irreparable, a Court of equity will exercise its jurisdiction to grant an injunction, and, whether the mischief be irreparable or not, it will, by decree, if not by order, upon motion, extend the jurisdiction of preventive justice to all cases of trespass in which damages would be an inadequate and uncertain remedy, and the protection of the right *in specie* is the only mode of doing complete justice. *North Union Railway Co. v. Bolton and Preston Railway Co.*, 345

INJURY.

See COMPENSATION,
INJUNCTION, 2, 3.

INQUISITION.

I. (*Sheriff's*.)

See COMPENSATION.

II. (*Coroner's*.)

1. Four deodands having been treated into the Court of Exchequer, under the 3 & 4 Will. 4, c. 99, s. 29, upon four coroner's inquisitions, which found, that the deaths of four persons were respectively caused on a certain day, by a certain steam-engine, and each imposed a deodand of £125 on the engine, the Court refused to stay proceedings on three inquisitions on payment of one deodand of £125, but left the defendants to their remedy by traversing, or quashing the inquisition. *Attorney-General v. Eastern Counties Railway Co.*, 145

2. The coroner of a borough has no jurisdiction to take an inquisition in a case of *accidental* death, where the cause of death arose out of the borough, though the death took place within it.

And, therefore, the Court quashed an inquisition, for want of jurisdiction appearing upon the face of it, which purported to be taken in the borough of Reading, by the coroner and a jury of the borough, on view of the body of R. W., lying dead within the borough; and which found that R. W. (by being thrown out of a railway carriage) accidentally received a mortal fracture, *in the county of Berks*, &c., and afterwards died of the said fracture in an hospital *within the borough of Reading*. *The Queen v. Great Western Railway Co.*, 161

INTEREST.

(*Of Sheriff.*)

See COMPENSATION, 4.

INVESTMENT.

See COSTS, 1, 3, 4, 5.

ISSUE AT LAW.

See INJUNCTION, 2.

JUSTICES.

See MANDAMUS, 3.

LANDOWNER.

See AGREEMENT, 1, 5, 6.

COMPENSATION.

CONSTRUCTION OF STATUTES.

CONVEYANCE.

LIGHT.

See COMPENSATION, 7.

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MANDAMUS.

MANDAMUS.

See AFFIDAVIT.

AGREEMENT, 6, 7.

BRIDGE.

COMPENSATION, 6, 16.

CONSTRUCTION OF STATUTES,
6, 19.

COSTS, 6, 7.

DEMAND AND REFUSAL.

1. *Semble*, that a *mandamus* should require some particular thing to be done to the bridge in such a case, and not, in general terms, that it "should be made conformably to the provisions of the act." *The Queen v. The Eastern Counties Railway Co.*, 22

2. By a Canal Act (33 Geo. 3, c. xcvi), the defendants were empowered to make a canal, to be called the Union Canal, from L. to N., with a cut from G. (a point in the line) to M. It being found impracticable to carry the work to N., another act was passed (45 Geo. 3, c. lxxi), enabling them to vary the line of the cut from G. to M., which was done accordingly. A third act was afterwards passed (50 Geo. 3, c. cxxii), for joining the Union Canal to the Grand Junction Canal, by means of a canal from G., to be called the Grand Union Canal; which was also done.

By the act 33 Geo. 3, the defendants were authorized to receive for coal, navigated upon the Union Canal and cut, a mileage tonnage of 2 $\frac{1}{2}$ *d.*, so as not to exceed a certain sum (5*s.*). By the 50 Geo. 3, it was enacted, that they should not be entitled to receive more than 2*s.* 6*d.* per ton for coal, navigated on the Union Canal, and thence on the Grand Union Canal for a certain specified distance (to H.); and 2*s.* 1*d.* if carried beyond that distance.

A *mandamus* issued, reciting that M. was aggrieved by the tonnage taken by the defendants on coal being

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higher from L. to M., by G., than if it were carried, after passing G., upon the Grand Union Canal; and commanding the defendants to establish a uniform rate of tolls along the whole of their line, or to take tonnage on coal from L. to M. only in proportion to that carried from L. to G., and afterwards upon the Grand Union Canal, so long as they took less than the 2s. 6d. and 2s. 1d. on coal carried from L. to G., and afterwards upon the Grand Union Canal. The return to the *mandamus* denied the demand and receipt of unequal tolls. A traverse to the return re-asserted these particulars.

Held (on demurrer to the traverse), that the first act having authorized a *mileage* toll, and the last act prohibiting in certain cases more than a certain amount of *gross* toll, the power of making a uniform rate of toll was expressly taken away from the defendants.

And that the first act having imposed such *mileage* toll on coal on the whole line of the Union Canal and cut, and having only exempted it from such toll if it passes along the Grand Union Canal, the original toll still prevailed from L. to M. on the Union Canal. *The Queen v. Leicestershire and Northamptonshire Union Canal Co.*, 1

Clarke v. Same, 730

See *The King v. Glamorganshire Canal Co.*, 16; and *The King v. Grand Junction Canal Co.*, 14.

3. A Railway Act, 6 & 7 Will. 4, c. cvi, (incorporating the Eastern Counties Railway Company), enacts, s. 36, that the Company shall not be obliged, nor any jury under the act allowed, to receive or take notice of any complaint for any loss or injury sustained in consequence of the execution of the powers of the act, unless notice in writing shall have been given by the complainant to the Com-

pany within six months after the time of such loss or injury. Sect. 41 enacts, that, in case of differences between the Company and owners, &c. of property as to the amount of damage done thereto by the Company under the powers of the act, the same shall (when the claim does not exceed £20) be determined by two justices. A subsequent act, 1 & 2 Vict. c. lxxxi, s. 42, in all cases of land occupied by the Company for temporary purposes, enacts, that the compensation for the same shall be ascertained in like manner by the justices, whatever may be the amount claimed:—*Held*, that the notice required by sect. 36 of the first act does not apply to cases before the justices. And therefore, where a justice had dismissed a complaint for want of proof of such notice, the Court granted a *mandamus*, calling upon him to hear and determine the complaint.

A rule nisi was afterwards obtained, calling upon the Company to shew cause why they should not pay the costs of the above *mandamus*; but, as it did not appear whether it had been even served on the justice, and he had made no return to it, the Court discharged the rule, on the ground that the application was premature. *The Queen v. Bingham*, 390

4. After argument and judgment on a return to a *mandamus*, the Court will, as a *general* rule, give costs to the party succeeding, under stat. 1 Will. 4, c. 21, s. 6. *The Queen v. Eastern Counties Railway Co.*, 186

MEMBER OF PARLIAMENT.

See AGREEMENT, 5.

MILEAGE.

See CONSTRUCTION OF STATUTES, 4, 7.

MANDAMUS, 2.

NONFEASANCE.

MINES (*Railways to*).

See EASEMENT.

By a Canal Act (32 Geo. 3, c. c, s. 54), the proprietors of any mines of coal within certain parishes are empowered to make any railways or roads to convey their coals, &c., to the intended canal over the lands of any person, first paying or tendering satisfaction for damage, &c. :—

Held, 1st, that this power of making railways was not limited to persons who were proprietors of coal-mines at the time of the passing of the act or of making the canal, but extended to subsequent proprietors.

2nd, that they were empowered to make railroads to be traversed by locomotive engines, though they were not in use when the act was passed.
Bishop v. North, 459

MINUTES.

See COMPANY, 2.

MISTAKE OF JUDGE.

See COMPENSATION, 5, 6.
COSTS, 6.

MORTGAGE.

See DEMURRER.

NAME.

See INDICTMENT.

NAVIGATION.

See CONSTRUCTION OF STATUTES, 7.

NEGLIGENCE.

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NONFEASANCE.

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NOTICE.

See COMPENSATION, 3, 4, 6.

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CONSTRUCTION OF STATUTES, 7.
CONTRACTS, 4, 6, 8, 9.
INDICTMENT.

1. *Seemle* the Court will draw a distinction between a supplemental bill adducing facts which had happened prior to the filing the original bill in support of the case made by that bill, and a supplemental bill adducing facts which happened prior to the original bill, but not put in issue by such original bill; but that the objection to such supplemental bill should be taken by demurrer, or by an application to take the bill off the file, and could not be properly taken at the hearing. *Ranger v. Great Western Railway Co.*, 298

2. Trespass, as well as trover, will lie against a corporation aggregate. *Maund v. Monmouthshire Canal Navigation Co.*, 159

PRACTICE.

See PLEADING.

1. Motion for inspection of parts of books sealed up by order of Court,

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though supported by affidavit, refused with costs. *Sheffield Canal Co. v. Sheffield and Rotherham Railway Co.*, 133

2. Hearing of appeal stayed pending motion for leave to file supplemental bill, in nature of bill of review. *Ibid.*

PROPRIETORS AND SUBSCRIBERS.

A defendant had subscribed the Parliamentary contract, but was not registered in the book as a proprietor:—*Held*, that the words “subscriber” and “proprietor” are synonymous in the act, and therefore that the defendant was liable as a subscriber in an action brought against him, under sect. 129, for calls made on the proprietors of the undertaking. *West London Railway Co. v. Bernard*, 649

PUBLIC.

See BYE LAWS.

CONSTRUCTION OF STATUTES, 6.
COMPROMISE, 1.
HIGHWAYS.

PURCHASE.—PURCHASER. PURCHASE-MONEY.

See CONTRACT, 3.
COSTS.

Upon the construction of the 157th section of the Manchester and Leeds Railway Act (7 Will. 4, c. cxi.), *Held*, that the costs of the payment of the dividends to accrue in respect of a sum the produce of lands taken by the Railway Company, and ordered to be invested, were not to be borne by the Company. *Mitchell v. Newell, re Manchester and Leeds Railway Act*, 515

SERVICE.

REVERSIONER.

See COMPENSATION, 7.

ROAD.

See BRIDGE.

CONSTRUCTION OF STATUTES,
2, 3, 5, 6.
HIGHWAYS.

SEAL.

1. Appointment of attorney under. *Thames Haven Dock and Railway Co. v. Hall*, 441
2. Contract under. *Regina v. Bristol and Exeter Railway Co.*, 777

SERVICE.

See EJECTMENT.

An act, 6 & 7 Will. 4, c. cxxxii, for making a railway from Dublin to Drogheda, provided that personal service of any summons or writ upon a secretary or clerk of the Company, or leaving the same at the office of the Company, or of a secretary or clerk, or delivering it to some inmate at such office of the Company, or at the last or usual place of abode of such secretary or clerk, or, in case the same respectively should not be found or known, then personal service thereof upon any other agent or officer employed by the Company, or any one director of the Company, should be deemed good service. A writ of summons was issued in England against the Company, who had no office or secretary in England, and was served upon one of the directors in England:—*Held*, that the proper service was upon the secretary or clerk at the office in Ireland, and if they could not be found, then upon a director there; but that service of an English writ of summons upon a director in England was void. *Evans v. The Dublin and Drogheda Railway Co.*, 760

SHARES (*Transfer of*).

See CALLS, 2.

CONTRACTS, 4, 5, 9.

SHERIFF.

See COMPENSATION, 4, 6.

SOLICITOR.

See AGREEMENT, 4.

CALLS, 3.

STAMP.

Semble, that the signature of the parliamentary deed by each subscriber does not require a separate stamp. *West London Railway Co. v. Bernard*, 649

STATION.

Steps, or a permanent ladder, come within the terms of the 7th section of the Eastern Counties Railway Act, and a road, platform, and steps, collectively constitute a station. *Lord Petre v. Eastern Counties Railway Co.*, 367

SUBSCRIBERS.

See PROPRIETORS.

SUNDAY.

See BYE-LAWS.

SUPPLEMENTAL BILL.

See CONTRACTS, 6.

EVIDENCE, 1.

TENANT.—TENANT FOR LIFE.

See COMPENSATION, 1.

Tenant for life of estates, the subject of a suit, having been served with notice by a Railway Company of their intention to apply for an act

to carry their railway through these estates, applied by petition for a reference to the Master to inquire what proceedings should be taken, and whether it would be fit to make any and what arrangements, and that the petitioner might be at liberty to take such proceedings, and enter into such arrangements. The order was made as prayed, with liberty to the petitioners to proceed with evidence on the Master making his report. *Davis v. Combermere. Re The South Eastern Railway Co.*, 506

TOLLS.—TONNAGE.

See CONSTRUCTION OF STATUTES, 4, 7, 9.

INJUNCTION, 2.

MANDAMUS, 2.

1. A Canal Act (33 Geo. 3, c. xciv, s. 82) empowered a Company to take, for tonnage upon all coals, stones, timber, corn, &c., and other goods, wares, and commodities whatsoever, which should be navigated or conveyed upon the canal, certain rates and duties not exceeding the sum of 2½d. for every ton, on entering into or passing out of the canal; and also not exceeding the sum of 1½d. per mile for every ton of coal, stone, timber, corn, &c., and other goods, wares, and commodities, *except* all dung, soil, marl, ashes, and other *manure*, (other than lime, which should pay half the said tolls), and except gravel, stone, or other materials for mending the roads, which should pass toll free, which should be navigated or conveyed upon the canal. Section 96 provided, that no boat or vessel should pass through any lock to be made under the act without the consent of the Company, unless such boat or vessel should pay a duty or rate equal to what would be paid by a vessel loaded with a burthen of thirty tons,

unless waste water should be running over the regulating weir of such lock, or unless such vessel should be returning after having passed on the canal with a greater burthen than thirty tons.

Held, that a boat laden with a burthen of *manure*, though greater than thirty tons, was entitled to navigate the canal, and to pass at any time through the locks, either going or returning, without payment of any toll. *Hall v. Grantham Canal Navigation*, 710

S. C. in Error, 723

2. Under a Canal Act (35 Geo. 3, c. lxxvii, s. 35), imposing a toll "on coals, lime, timber, bricks, stone, and all other goods, wares, or merchandise whatsoever, gravel and materials for the repair of turnpike roads are liable to toll. *Coulton v. Ambler*, 724

3. See *The Stockton and Darlington Railway Co. v. Barrett* (in Error), 724

TRANSFER OF SHARES.

See CALLS, 2.

TRESPASS.

See AGREEMENT, 1.

COMPENSATION, 8.

INJUNCTION, 3.

Trespass, as well as trover, will lie against a corporation aggregate. *Maund v. The Monmouthshire Canal Navigation Co.*, 159

TRUSTEES.

See AGREEMENT, 2.

YARD AND GARDEN.

VENDOR AND PURCHASER.

See CONTRACTS, 3.
COSTS.

VERDICT.

See AGREEMENT, 1.
CONTRACTS, 1.

It being proved that the verdict of the jury had never been recorded under section 31 of stat. 3 & 4 Vict. c. 97, parol evidence of it, and of the grounds on which it proceeded, was admissible. *Manning v. Eastern Counties Railway Co.*, 637

WARRANT.

See COMPENSATION, 3, 3, 6, 9, 11.

WATER.

See AGREEMENT, 6, 7.
COMPENSATION 7.

WAY.—WAY-LEAVE.

See EASEMENT, 1.
MINES.

WORKS.

See AWARD.

BRIDGE.

CONTRACTS, 1, 6, 8.

DEMAND AND REFUSAL.

YARD AND GARDEN.

(Included in "House.")

See COMPENSATION, 3.

